

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF
CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS and
EAST GATE RECREATION ASSN., INC.

Applicants
William Landfair, Philip Savard,
Brian Siverling, Robert Posilkin, Esq.
Paul Dugan, Robert Steere
For the Application
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Greg Diamond, Esquire
Thomas Barnard, Esquire
Elizabeth Cappiello, Esquire

Attorneys for the Applicants¹

OZAH Case No. CU-T-17-01

Howard & Monica Finkel,
Greer Dellafiora, Jeanine Resnick,
Ac Tedesco, Annette Perlin, Dana Ettinger,
Geraldyn Franceschini, Jamie Perry
William J. Chen, Jr., Esquire
Attorney for Adjacent Property
Owners opposing the Application

Grace Chen, Alan Privot, Brian Pashkoff,
Cheryl Wetter, Don Pace, Jessica Bejaranno,
Carolyn Tebo, Jerry Garson (for the SLCA),
Susanne Lee (for the WMCCA), Fatima
Sabri, Norma Collendani, Matthew Phillips,
Beth Lilienstein, Marilynn Leon, Terrance
McPherson, Ronald Danielian, Lawrence
Monroe, Russell Reese and Joe Davis

Witnesses Opposing the Application

Before: Tammy J. CitaraManis, Hearing Examiner
Office of Zoning and Administrative Hearings

HEARING EXAMINER'S REPORT AND DECISION

¹ Ms. Borten and Mr. Diamond represent the Applicant, Cellco Partnership d/b/a Verizon Wireless (Cellco). Mr. Barnard and Ms. Cappiello represent the Co-applicant, East Gate Recreation Association, Inc. (East Gate).

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I. STATEMENT OF THE CASE

On September 23, 2016, Cellco Partnership d/b/a Verizon Wireless (“Cellco” or “Verizon”) filed an Application for Conditional Use to permit construction of an unmanned wireless Telecommunications Tower (“Tower” or “Support Structure”) and related equipment area in the parking lot of the East Gate Swim and Tennis Club (Swim Club) under Section 59.3.5.2.C (Telecommunications Tower) of the Zoning Ordinance (2014). The property is owned by East Gate Recreation Association, Inc. (“East Gate” or “EGRA”)² Exhibits 1-3. Located at 10200 Gainsborough Road, Potomac, Maryland, the parcel is identified as Parcel C, Block J, in the East Gate of Potomac Subdivision.³ The larger parcel is divided into two lots. One is identified as Parcel C, Plat 10 (1.32 acres), and the other is identified as Parcel C, Plat 11 (3.4 acres) (Tax Account Nos. 10-00910008 and 10-00909658). The property lies within the R-200 Zone (Residential Detached), which permits telecommunications towers as a conditional use.

The property is already subject to an existing special exception (S-596) for a community swimming pool and tennis club.⁴ East Gate filed a request for an administrative modification of its special exception under Section 59.G-1.3(c)(1) of the Zoning Ordinance (2004) (Administrative

² Cellco filed the original application pursuant to the terms and authority of an executed Land Lease Agreement with East Gate dated November 2, 2015 (Lease) and Affidavit of Ownership dated July 22, 2016. Exhibits 2(a)-(b). However, Section 59.3.5.2.C.2.b.v of the Zoning Ordinance (2014) provides: “[t]he property owner must be an applicant for the conditional use for each support structure.” East Gate was not a named applicant on the original application. To correct this oversight, Cellco filed a Motion to Amend the Application to add East Gate as Co-applicant on October 18, 2016. Exhibit 27. The Motion to Amend was granted by Order dated November 25, 2016. Exhibit 63. The original application was corrected and signed by Michael Farber, President of the East Gate Board of Directors. Exhibit 27(a). Cellco and East Gate are collectively referred to as Applicants.

³ This site and the four East Gate communities surrounding the site were developed as a cluster subdivision. The site is delineated on the preliminary plan of subdivision and record plat No. 508-29, recorded July 30, 1970, and No. 508-43, August 7, 1970, as the future recreation area to be conveyed to EGRA. See, Exhibits 76(c)-(d). The developer conveyed the property to EGRA in 1976. Exhibit 76(o).

⁴ The special exception was modified in 1978 (lights), 1980 (hours of operation), 1980 (single basketball backboard) and 1983 (sale of frozen candy bars, ice cream and soda). The Board rescinded its approval of the single basketball backboard in a Resolution dated September 18, 1980. Case No. S-596 Exhibit 38(a). The Board found these to be minor modifications of the special exception and granted the requests without a public hearing pursuant to its authority under Section 59-G-1.3.(c)(1) of the Zoning Ordinance (2004).

Modification) to allow the proposed conditional use on the property and modify the existing parking lot. Case No. S-596, Exhibit 38(a).⁵ By Resolution dated October 10, 2016, the Board referred the administrative modification request to the Office of Zoning and Administrative Hearings (OZAH) “for consideration with Conditional Use Case No. [CU-T-17-01], and for the issuance of a report and recommendation on the requested modification.”⁶ Exhibit 38(b), p. 2. The matters were consolidated in the original Notice of Hearing issued October 13, 2016. Exhibit 24.

The application has undergone several revisions. Initially, the Applicants proposed an 80-foot tall tower (with antennas extending to 83’) and fenced 700 square-foot equipment compound in the parking lot of the Swim Club. The Montgomery County Transmission Facility Coordinating Group (“TFCG” or “Tower Committee”), reviewed the application and in a Notice of Action dated June 29, 2016, the Tower Committee recommended approval subject to “approval of a Conditional Use for the placement of the monopole.” Exhibit 5(a). The Notice of Action and Tower Coordinator Recommendation were submitted with the original conditional use application filed with OZAH on September 23, 2016. Exhibits 5(a)-(b).⁷

OZAH issued notice of the public hearing on October 13, 2016, scheduling it for November 18, 2016. Exhibit 24. The public hearing was subsequently rescheduled to December 19, 2016, and again to January 9, 2017, at the Applicants’ request.⁸ Exhibits 29, 30, 31, 32, 69, 71. With

⁵ Exhibits from the special exception file are specifically identified “Case No. S-596 Exhibit xx”. The Board of Appeals opinion is also identified as Exhibit 76 (l).

⁶ The Board found “that the effect of the proposed telecommunications tower and related equipment cabinet on the immediate neighborhood will be addressed in the context of the pending conditional use proceedings. Accordingly, the Board finds that the effect of these proposed additions on the swim club property on the immediate neighborhood cannot be known with certainty prior to the conclusion of the conditional use proceedings.” Case No. S-596 Exhibit 38(b), p. 2. By Memorandum dated October 10, 2016, the Board transmitted the special exception file to the OZAH. Case No. S-596 Exhibit 39.

⁷ At the October 13, 2017, hearing, Applicants submitted a copy of the June 22, 2016, TFCG meeting minutes and a list of the Tower Committee member’s. Exhibits 236 and 237. Ms. Marjorie Williams, Chair of the TFCG, provided the Hearing Examiner with a copy of the original application and supporting documents in an e-mail dated January 9, 2017. Exhibit 253.

⁸ The first request to reschedule the hearing was due to the unavailability of some of the Applicants’ witnesses. Exhibits 29, 30. The second request was to cure a potential notice issue. Exhibit 69.

each request, the Applicants agreed to waive the “shot clock” (i.e., a requirement of Federal law that cell tower applications be decided within 150 days of the date the application is filed.)⁹

OZAH received numerous letters of opposition to the original application. Concerns raised included possible adverse health effects from radio frequency emissions, the tower’s visual impact on surrounding properties, property values, increased traffic, and noise. Many residents requested that the application be delayed or dismissed. Exhibits 33(a), 35, 36(a), 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49. Since none of the concerns raised in the letters of opposition provided grounds to delay or dismiss the application, the Hearing Examiner denied these requests in an Order dated November 25, 2016. Exhibit 63.

Some individuals also challenged the validity of the Lease agreement, alleging that it had not been signed in compliance with East Gate’s By-Laws. Issues regarding East Gate’s corporate structure and authority are matters within the jurisdiction of the Circuit Court. Md. Code, Cts. & Jud. Proc. § 3-403. Exhibit 117, p. 2. Those issues are the subject of a Declaratory Judgment action filed by adjacent property owners in the Circuit Court for Montgomery County. *See Jeanine Resnick, et al. v. East Gate Recreation Association, Inc., et al.*, Civil Action No. 427434-V. The parties in that matter voluntarily stayed proceedings pending resolution of the zoning matters. Tr. 24. East Gate subsequently filed a Motion In Limine to exclude any evidence related to the issues which are the subject of the Declaratory Judgement action before the Circuit Court. The Opposition agreed and the motion was granted. Exhibit 201.¹⁰

William J. Chen, Jr., Esquire, entered his appearance and filed pre-hearing submissions on behalf of nine adjacent and confronting property owners (collectively, the Opposition) who

⁹ The “shot-clock” is a ruling by the Federal Communications Commission (FCC) creating a presumption that 150 days is a reasonable time period for a local community to process an application for permission to erect a cell tower. However, the Applicant can waive the shot clock.

¹⁰ The Motion In Limine was filed on September 25, 2016, and granted at the September 26, 2017, hearing. Tr. 24.

opposed the application and administrative modification request.¹¹ Exhibits 65 (a)-(d) and 76 (a)-(u).

On December 10, 2016, Technical Staff filed a staff report recommending approval of the application, subject to five conditions.¹² Exhibit 75(a). After the Staff Report was filed, the Applicants submitted revised photo simulations of the proposed tower. The original photo simulations taken from Snug Hill Lane (identified as view #1 (Exhibit 15(b)) and from Gainsborough Road (identified as view #5 (Exhibit 15 (f)) showed the tower located within a stand of existing trees, rather than the proposed location within the parking lot of the Swim Club. Verizon revised these simulations to depict the tower in the correct location. Exhibit 74(a)(i) and (ii).

Staff issued an Addendum to Staff Report on December 30, 2016, to address the revised photo-simulations. Exhibit 84(a). Staff found that the new simulations demonstrated that the tower was “significantly more visible from off-site views.” *Id.*, at p. 3. Staff also reviewed the administrative modification (S-596) request and found that “the Project does substantially alter the nature, character, intensity of the recreational facility and the conditions of the original grant because of the height, design, visual obtrusiveness, and lack of screening.” *Id.*, at p. 4. As a result, Staff decided to withhold their initial recommendation pending receipt and review of alternate designs addressing the visual impact of the tower. *Id.*, at p. 5.

On January 3, 2017, Applicants filed a motion to continue the hearing to allow time to provide Staff with the requested information and amend their application. Exhibit 86(a). Because the request was filed six days before the scheduled hearing, there was insufficient time to issue a

¹¹ The property owners are identified in the heading. The properties are all located north and northwest of the site on either Snug Hill Lane or Snug Hill Court.

¹² The Technical Staff report and amendments are frequently quoted and paraphrased herein.

written ruling and provide adequate notice postponing the hearing. As a result, the Hearing Examiner convened the hearing as scheduled on January 9, 2017, to grant the Applicants' motion.¹³ Cathy Borten, Thomas Barnard, and William Chen were present at the hearing. Counsel for the Applicants requested that the hearing be postponed indefinitely. Ultimately, the parties agreed to waive the shot clock for an indefinite period. They agreed that the new hearing date and resumption of the shot clock would either be agreed by counsel or set by the Hearing Examiner. The Hearing Examiner granted Applicants' request and the hearing was postponed indefinitely. 1/9/17 Tr. 8.¹⁴

Prior to the Applicants' filing an amended application, OZAH received additional letters of opposition, generally citing the same concerns previously raised. Several residents requested that the case be dismissed and to be named a party of record. The Hearing Examiner denied most of the requests to be made a party of record because they did not meet the requirements of OZAH Rule 3.1.¹⁵ Exhibit 142. The Hearing Examiner granted the request of Ms. Cheryl Wetter of 6 Snug Hill Court to become a party of record because she demonstrated her interest as an individual property owner located in close proximity and in view of the proposed tower may not be adequately represented by the other parties of record. Ms. Wetter subsequently filed a variety of pre-hearing

¹³ Initially, the Opposition indicated they did not oppose the motion to postpone the hearing *subject* to a provision that they be given equal time to review the "design alternatives" before they were filed with staff. Exhibit 88(a). However, the Opposition later clarified in writing and at the hearing that they did not oppose the request to postpone the hearing. Exhibits 88(a), 90(b), 94, 95. The Opposition's responses were filed to identify other issues related to the administrative modification request and clarify representations made in the Applicants' reply, none of which related to the request to indefinitely postpone the hearing.

¹⁴ There are four hearing dates: January 9, 2017, September 26, 2017, September 27, 2017, and October 13, 2017. With the exception of the January 9, 2017, motions hearing, the transcripts for the hearings in September and October are numbered consecutively from pages 1 to 957. Reference to the January transcript will identify the hearing date and page number (i.e., "1/9/17 Tr. Xx"). Because the transcripts for the other three days of hearing are consecutively numbered, all other hearing transcript references will be "Tr. xx" without identifying the hearing date. The hearing dates can be identified as follows: September 26, 2017 – pages 1 to 347; September 27, 2017 – pages 348 to 679; and October 13, 2017 – pages 680 to 957.

¹⁵ To be considered a party of record prior to the public hearing, OZAH Rule 3.1 mandates that individuals must demonstrate that no other party will adequately represent their interests in the pre-hearing proceedings. OZAH Rules of Procedure, Rule 3.1(b). All individuals that testify at the public hearing automatically become parties of record. *Id.*, Rule 3.1(a).

requests which were denied. Exhibit 131. Ms. Wetter filed pre-hearing submissions on December 19, 2016, and attended the public hearings *pro se*. Exhibit 72(a)-(h).

Other pre-hearing submissions were filed by the following individuals who also testified at the public hearing: Jerry Garson, President of the Seven Locks Civic Association (SLCA) (Exhibit 67); Brian Pashkoff (Exhibit 77(a));¹⁶ and Susanne Lee, Vice President of the West Montgomery County Citizens Association (WMCCA). (Exhibit 190).

In May 2017, Staff reported for the first time that the Applicants needed a waiver of the setbacks from the southern property line. Exhibit 141(c). Staff advised that the need for the waiver was “inadvertently overlooked in the original filing.” Exhibit 197(a), p.3. Under the Zoning Ordinance, the tower must be set back from the property line one foot for every one foot of height of the tower or 300-feet from the closest existing dwelling, whichever provides the greater setback. Section 59.3.5.2.C.2.b.ii.(b) of the Zoning Ordinance (2014). Staff informed the Applicant that the height of the tower at 80-feet provides a greater setback to the property line since there are no dwellings within 300 feet of the tower location. Exhibit 141(c).

On June 29, 2017, Applicants filed an amended application and request for a setback waiver from the property line to the south. The amended application also proposes additional screening to camouflage the 80-foot tall tower. The screening consists of faux branches designed to resemble a pine tree. With the faux branches, the height of the tower extends to 89 feet. Finally, the Applicants proposed screening slats for the compound fence and additional landscaping on the northern slope along Snug Hill Lane. Exhibits 145(a)-(m).

¹⁶ Mr. Pashkoff of 8320 Snug Hill Lane testified that he is a licensed real estate agent in Maryland, Washington D.C., and Virginia. He testified as an individual and adjacent property owner. He submitted a letter signed by many real estate agents at the Long & Foster office located at 7719 Tuckerman Lane, Potomac, Maryland. The agents expressed their opinion that the proposed tower will reduce property values. With the exception of Mr. Pashkoff, none of the agents testified at the hearing. Tr. 692-702.

Technical Staff filed an Amended staff report dated September 15, 2017, recommending approval of the amended application, with 7 conditions, as follows (Exhibit 197(a), p. 2):

1. Approval of a concurrent administrative modification to the existing Special Exception (S-596) for the community recreation club located on the same site as the Project.
2. The Applicant shall, at a minimum, maintain placement and density of the existing foliage, trees, and landscaping to adequately obscure the Project from off-site views as depicted in the Applicant's photo-simulation images (Attachment C). Any existing plant material used in [] fulfillment of this condition that dies or becomes diseased shall be promptly replaced by the Applicant.
3. The Applicant shall at a minimum, provide and maintain the landscape plan as indicated on sheet L-1 of the plans and dated January 20, 2017. The Applicant shall aid in ensuring the landscape plantings mature in a healthy growing condition. Any plant material planted in [] fulfillment of this condition that dies or becomes diseased shall be promptly replaced by the Applicant.
4. The Applicant shall, as a minimum, construct and maintain the Project in substantial conformance with the photo-simulation which depicts the tower support structure as a pine tree with densely placed and overlapping tree branches. (Attachment C).
5. Pursuant to Sec. 3.5.2.C.2.b.i of the Montgomery County Zoning Ordinance, the Applicant shall submit to the Hearing Examiner a letter from the County Transmission Facility Coordinating Group (CTFCG) reflecting their review and recommendation of the Project.
6. Pursuant to Sec. 3.5.2.C.2.b.x of the Montgomery County Zoning Ordinance, the support structure must be identified by a sign two-square feet, or smaller, affixed to the support structure or any equipment building.
7. Pursuant to Sec. 3.5.2.C.2.b.ix of the Montgomery County Zoning Ordinance, the support structure must be removed at the cost of the owner of the Telecommunications Tower when the Telecommunications Tower is no longer in use by any wireless communication carrier for a period of more than 12 months.

Before the Applicants filed their amended application with OZAH, Staff determined that the TFCG did not need to review the amendment because “[o]nly aesthetic and camouflaging

changes are proposed.” Exhibit 99. Marjorie Williams, Tower Coordinator for the TFCG, agreed with Staff and confirmed that the application did “not need to be re-reviewed by the TFCG.” Exhibit 99(a).

Based on agreement of counsel for the parties, the public hearing was rescheduled for September 26, 2017, and September 27, 2017. Exhibit 164. On August 30, 2017, the Hearing Examiner issued an Order Granting the Applicants’ Motion to Amend the application and denying (1) requests to postpone the public hearing, and (2) a request for retraction and dismissal of the application. Exhibit 189.

Pre-hearing submissions were timely filed by all parties. Exhibits 179(a)-(g), 180(a)-(g), and 191(a)-(l), 195. However, on September 11, 2017, Applicants filed a motion to amend their pre-hearing submissions to add Phillip Savard, an expert witness in digital simulation photography, to its witness list. Exhibit 192. The Opposition objected and asked that the motion be denied or the Opposition be given time to find a similar expert. Exhibits 198, 199.

The public hearing convened on September 26, 2017, as rescheduled. The Applicants’ two pre-hearing motions were addressed and granted as a preliminary matter. The Applicants did not oppose the Opposition’s request for additional time to find a similar expert and waived the shot clock without conditions.¹⁷ Instead of postponing the hearing, the parties agreed to add a third hearing date to be held on October 13, 2017. Without objection, the Hearing Examiner also granted East Gate’s Motion In Limine filed September 25, 2017. The motion asked to “exclude any evidence challenging the proprietary nature of the East Gate Board’s resolution to enter into the Land Lease Agreement [with Cellco.]” These issues are the subject of the Exhibit 201.

¹⁷ The Opposition was given 10 days to find a similar expert witness. The Opposition filed a timely response on October 9, 2017, indicating that they did not intend to call an expert witness in digital simulation photography. Exhibit 229; Tr. 17-21.

The following witnesses testified in support of the application: Mr. William Landfair, an expert in land planning; Mr. Phillip Savard, an expert in digital simulation photography, Mr. Brian Siverling, an expert in civil engineering and site development survey, Mr. Robert Posilkin, Esquire, an expert in telecommunications site acquisition, Mr. Paul Dugan, an expert in radio frequency Radio Frequency (RF) wireless communication engineer, and Mr. Robert Steere, an expert in market analysis.

The Opposition called five witnesses: Mr. Terrence McPherson, an expert in land appraisals; Mr. Ronald Danielian, an expert on the economic impact of the tower on property values; Mr. Lawrence Monroe, an expert in the process of permitting of towers and wireless facilities; Mr. Russell Reese, a land surveyor expert; and Mr. Joseph Davis, an expert in land planning. Three individuals, Grace Chen, Jeanine Resnick and Greer Dellafiora, testified in opposition to the application. At the end of the hearing, the Hearing Examiner announced that the hearing would resume on October 13, 2017.¹⁸

Two days prior to the October 13 public hearing, the Opposition filed a Memorandum on the Subdivision Condition that Restricts the Use of the Subject Property and Impermissible Special Exception Modification Request (Opposition Memo). Exhibit 231. Applicants' Motion to Strike the Opposition Memo was denied. The Applicants then requested additional time to file a responsive memorandum and the Opposition requested leave to file a reply. The Hearing Examiner granted both requests. Tr. 953-955.

At the October 13, 2017, hearing the following individuals testified in opposition to the application: Brian Pashkoff, Alan Privot, Cheryl Wetter, Howard Finkel, Don Pace, Jessica Bejarano, Carolyn Tebo, Jerry Garson (President of Seven Locks Civic Association), Fatima Sabri,

¹⁸ In order to accommodate the many individuals who wished to testify but could not attend the October 13, 2017, hearing, Applicants agreed to waive their right to cross-examination and accept written testimony. Tr. 674-677

Norma Collendani, Matthew Phillips, Beth Lilienstein, Annette Perlin, Marilyn Leon, and Susanne Lee (Vice President West Montgomery County Citizens Association). The testimony of the witnesses is summarized in this Decision where relevant.

To provide Applicants with sufficient time to file a response to the Opposition Memo, and for the Opposition to file a reply, the Hearing Examiner announced at the October 13, 2017, hearing that the record would remain open for an additional 27 days and close on November 9, 2017. Tr. 955. Prior to the closing, the Applicants filed a Memorandum on Subdivision and Special Exception Modification on October 30, 2017. Exhibit 246(a)-(e). Cheryl Wetter filed a Response to Applicants' Memorandum on Subdivision and Special Exception Modification on November 3, 2017. Exhibit 247(a). The Opposition filed a Reply to Memorandum of Applicants on November 6, 2017. Exhibit 248(a)-(b). The OZAH also received letters of opposition from Marilyn Leon (Exhibit 243), Wei Chen (Exhibit 244), and Beth Jarrett (Exhibit 245). The record closed as scheduled on November 9, 2017.

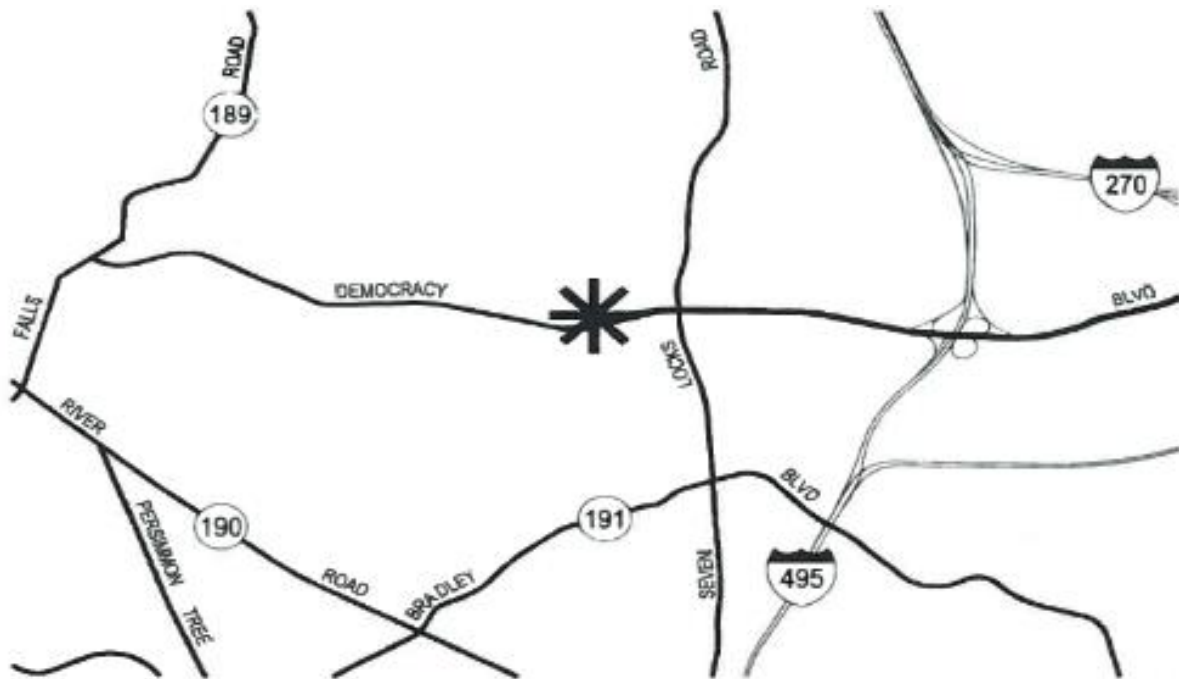
Subsequently, the Hearing Examiner discovered that exhibits and information in the Staff report were missing from the record. To receive these missing exhibits, the Hearing Examiner reopened the record by Order dated December 8, 2017. Exhibit 253. The record closed as scheduled on December 22, 2017. By Orders dated January 17, 2018, and February 21, 2018, the Hearing Examiner extended the time to file the report and decision on the conditional use application (CU-T-17-01) and report and recommendation on the administrative modification of special exception Case No. S-596. Exhibits 257, 258.

For the reasons that follow, the Hearing Examiner finds that the application does not meet the Zoning Ordinance requirements for approval of a conditional use for a telecommunications tower on the subject property and denies the application.

II. FACTUAL BACKGROUND & SIGNIFICANT ISSUES

A. The Subject Property

As previously described, the subject property is approximately 4.48 acres in size and is located in the northwest quadrant of the intersection of Democracy Boulevard and Gainsborough Road in the R-200 Zone. The general location is shown below on the location map in the Technical Staff Report (Exhibit 197(a), p. 1):



The property is bounded by Democracy Boulevard to the south, Gainsborough Road to the east, Snug Hill Lane to the north and Bucks Branch Park to the west. Cabin John Park is to the east and south of the property. The parcel is divided into two lots. The larger of the two lots is rectangular and located on the east side of the property. The smaller lot to the west has an irregular shape best described as a backward “L”. The developed portion of the property is flat with steep slopes to the west, north and east. Applicants’ expert in land planning, William Landfair, described the property as having a “bowl” appearance. Tr. 55.

Technical Staff described the subject property as follows (Exhibit 197(a), p. 4):

The topography of the property is generally flat, with steeper slopes and mature trees located along the west, north, and east property lines. The elevation rises from about 220 feet near the southwestern portion of the property to about 255 feet towards [the] north, east and southeastern property lines. A forested area is present along the southerly property line. There are no streams, wetlands, or known rare endangered species present. There are no historically significant structures or sites located on or near the property.

The improvements on the property include a 25-meter swimming pool with an expansive deck, wading pool, bathhouse, three lighted tennis courts and 79- space surface parking lot. Access to the swim club entrance and parking lot is via a driveway from Gainsborough Road.¹⁹ The parking lot is located along the south side of the property and extends southwest of the tennis courts. The tennis courts and pool facilities are located on the north side of the parking lot. Bike racks are located on a landscape island within the parking lot, which is directly across from the entrance to the tennis courts. An existing stand of mature trees runs along the southern property line between the parking lot and Democracy Boulevard. The tree stand includes a mix of deciduous and evergreen trees estimated to be between 60 and 70 feet tall.

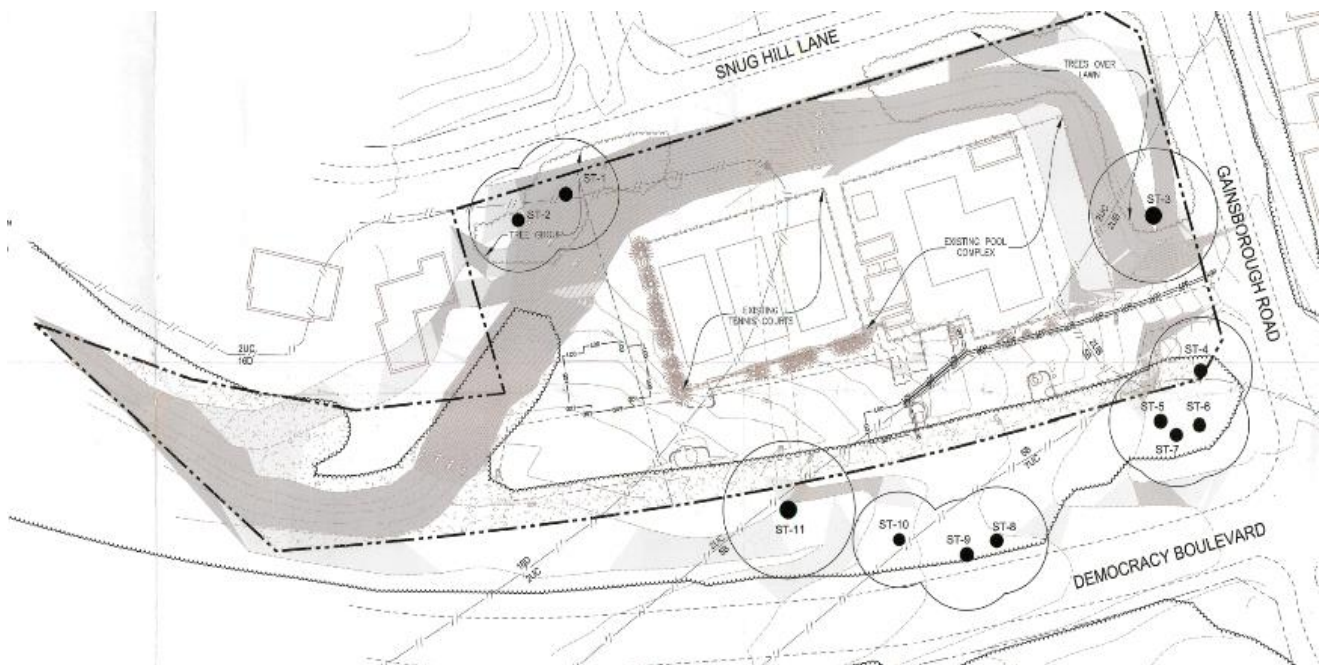
The existing site is depicted in an aerial photograph taken from the Staff report, shown on the next page (Exhibit 197(a), p.4):

¹⁹ In 1978, Democracy Boulevard did not extend beyond Gainsborough Road. As a condition of approval (#5) of the special exception (S-596), the Board stated, in pertinent part: "At such time as Democracy Boulevard is extended westward, a second driveway entrance to the property shall be provided from that street, with location subject to approval by the Montgomery County Department of Transportation." Exhibit 76(k), p. 9. A second driveway was never added.



Figure 1 - 10200 Gainsborough Road, Potomac, MD

The existing structures, topography and environmental features on the site, including the identification and location of forests, specimen and significant trees, hedges and shrubs are shown below on the approved Forest Conservation Exemption Simplified Delineation and Natural Resource Inventory Plan (FSD/NRI Plan), filed with the application (Exhibit 14):



LEGEND:

	EX. SUBJECT PROPERTY BOUNDARY
	EX. PROPERTY LINE
	EX. EASEMENT
	EX. 5-FOOT CONTOUR
	EX. 1-FOOT CONTOUR
	EX. PAVING
	EX. CHAIN LINK FENCE
	EX. SOIL LINE
	PR. LIMIT OF DISTURBANCE
	EX. STRUCTURE
	SPECIMEN SIGNIFICANT TREE WITH KEY# (SHOWN AT SIZE OF CRITICAL ROOT ZONE)
	EX. FOREST LIMITS
	EX. HEDGEROW, SCRUB/SHRUB, GROUPS OF TREES <10,000 SQUARE FEET
	EX. INDIVIDUAL TREE/SHRUB
	SLOPES ≥ 15% & < 25%
	SLOPES ≥ 25%

RESOURCE DATA TABLE:

SITE STATISTICS	TOTAL ¹
GROSS TRACT AREA	4.48
EXISTING FOREST AREA	1.00
EXISTING WETLANDS AREA	0
EXISTING FOREST IN WETLANDS AREA	0
EXISTING FLOODPLAIN AREA	0
EXISTING FOREST IN FLOODPLAIN AREA	0
EXISTING STREAM BUFFER AREA	0
EXISTING FOREST IN STREAM BUFFER AREA	0

1. QUANTITIES PROVIDED IN ACRES ROUNDED TO THE NEAREST FIFTH OF AN ACRE UNLESS OTHERWISE INDICATED.

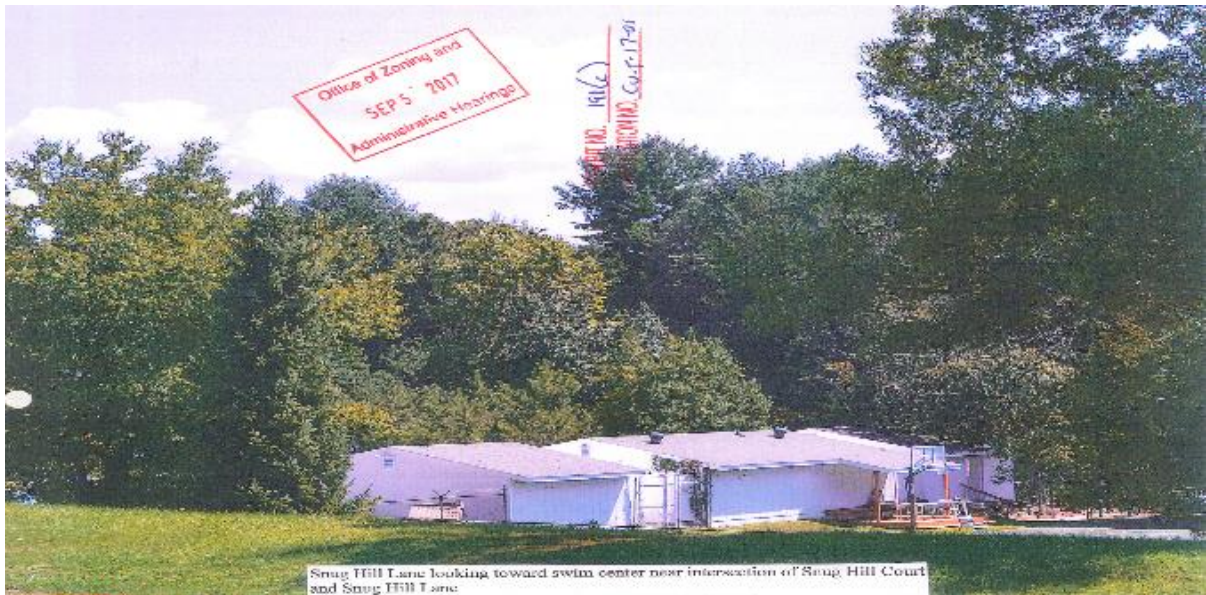
SPECIMEN AND SIGNIFICANT TREE LIST:

NUMBER	SCIENTIFIC NAME	COMMON NAME	DBH	CONDITION	COMMENT
ST-1	PINUS STROBUS	WHITE PINE	21"	GOOD	
ST-2	ACER RUBRUM	RED MAPLE	27"	GOOD	
ST-3	QUERCUS PHELLOS	WILLOW OAK	18"	GOOD	
ST-4	PINUS STROBUS	WHITE PINE	28"	GOOD	
ST-5	PINUS STROBUS	WHITE PINE	28"	GOOD	
ST-6	PINUS STROBUS	WHITE PINE	27"	GOOD	
ST-7	PINUS STROBUS	WHITE PINE	27"	GOOD	
ST-8	PLATANUS OCCIDENTALIS	AMERICAN SYCAMORE	28"	FAIR	CHOKED BY VINES
ST-9	LIRIODENDRON TULPIFERA	TULIPTREE	29"	GOOD	
ST-10	JUGLANS NIGRA	BLACK WALNUT	25"	GOOD	
ST-11	PLATANUS OCCIDENTALIS	AMERICAN SYCAMORE	36"	GOOD	

The entrance and driveway into the swim club from Gainsborough Road are shown below in a photograph taken in June or July 2017 by Ronald Danielian, the Opposition's expert in economic value of properties (Exhibit 191(c)(iii)):



Mr. Danielian also provided a photograph of the swim club facilities looking south from Snug Hill Lane near the intersection with Snug Hill Court (Exhibit 191(c)(i)):



B. Surrounding Neighborhood

To determine the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as those properties located within 2,000 feet of the subject property. As described by Technical Staff (Exhibit 197(a), p. 5):

The 2,000-ft radius generally includes property to Scarboro Court, Windsor View Drive and Democracy Lane on the north; Timber Hill Lane on the west; West Buckspark Lane, West Gainsborough Court, East Gainsborough Court, East Buckspark Lane, Buckspark Court to the south; and to Seven Locks Road to the east.

Except for the subject property, the neighborhood consists entirely of single-family residences and Cabin John Regional Park. There [are] no known pending or proposed project approvals in the neighborhood vicinity.

Staff provided an aerial photograph identifying the site and a 2,000-foot radius shown on the next page (Exhibit 197(a), p. 6):



Figure 2 - 2,000 ft. vicinity neighborhood map

The property is surrounded by single-family detached and attached homes. The single-family detached homes located to the north, west and south of the property are in the R-200 Zone. The townhouse community east of Gainsborough Road and north of Democracy Boulevard is located in the R-90 Zone. The single-family homes to the north on Snug Hill Lane have a ground level of approximately 255 feet and overlook the swim club facilities. Bucks Branch Park is to the west and Cabin John Park is further east and south of the property.

In addition to the existing special exception (S-596) located on the property, Staff identified three existing special exceptions located within 2,000 feet of the property on a zoning map of the neighborhood (Exhibit 197(a), p. 7):



Figure 3 - Location of approved special exception cases within 2,000 ft. of the subject property

These include a second kitchen in a single-family dwelling (S-1297-MO), a home occupation (S-1086) and operation of a private school (CBA 2197-B). Staff found that the addition of the proposed conditional use to the neighborhood will not “increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area[.]” Exhibit 197(a), pp. 6, 21. In support of this finding, Staff states (*Id.*, p. 13):

The Project is located on a nonresidential use site within an established residential neighborhood. Currently, the site is operating under Special Exception S-596 as a private recreation club. Club facilities include a swimming pool and tennis courts. The Project consists of a telecommunications tower and appurtenant operational equipment. The project would operate independently of the existing special exception and would not cause any conflict with or cause an increase in impacts of the operation of the recreation club. [As a result, Staff found] there is not an overconcentration of special exceptions in the neighborhood. Therefore, there is no impact.

Applicants’ land planning expert, William Landfair, generally agreed with the boundaries of the neighborhood proposed by Staff. However, Mr. Landfair described a smaller neighborhood boundary, extending the eastern boundary only to Democracy Lane and not to Seven Locks Road as proposed by Staff. As a result, the neighborhood radius proposed by Mr. Landfair eliminates all special exceptions but the existing special exception on the subject property. Exhibit 145(b), p. 4; Tr. 55, 56. Mr. Landfair did not take exception to Staff’s slightly broader neighborhood boundaries.

C. Proposed Use

1. Site Plan (Tower and Compound)

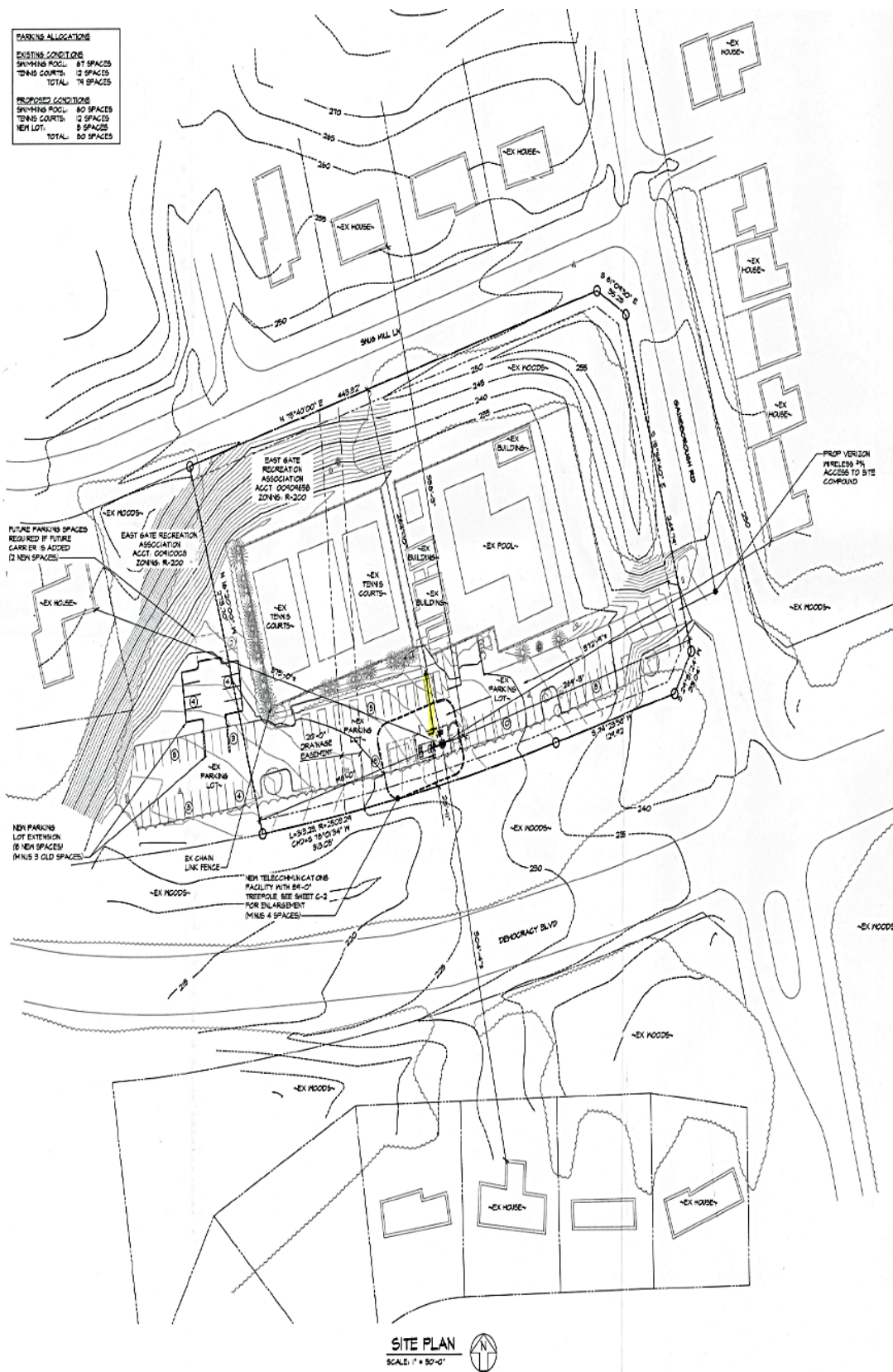
As noted, the amended application seeks conditional use approval to construct an 80-foot tall tower camouflaged to look like a pine tree, commonly referred to as a “monopine” or “tree pole”. The faux branches will extend the height of the tower to 89 feet. The tower and related

equipment will be located within a fenced 700-square foot area that Verizon will lease from East Gate. It will be located on the south side of the swim club parking lot. The equipment compound will displace the first four parking spaces on the west side of the parking lot landscape island where the bike racks are located. Mr. Landfair testified that the driveway isle is 24' wide and the distance from the compound fence across the parking lot to the sidewalk in front of the tennis courts is approximately 42 feet.²⁰ Tr. 78-81. The distance is highlighted in yellow on the site plan, shown below and on the following page (Exhibit 145(c)):

SITE NOTES:

1. APPLICANT: VERIZON WIRELESS
7600 MONTPELIER ROAD, FLOOR 2 SOUTH-NETWORK
LAUREL, MD 20723
TEL. (301) 512-2000
FAX (301) 512-2186
- APPLICANT'S ATTORNEY: M.G. DIAMOND
LAW OFFICES OF M. GREGG DIAMOND, P.C.
7500 WOODMONT AVENUE, SUITE 402
BETHESDA, MARYLAND 20814-5379
(240) 396-5379
2. PROPERTY OWNER: EAST GATE RECREATION ASSOCIATION
PO BOX 543
BETHESDA, MARYLAND 20827
3. SITE DATA: MAP: 6P13, SUBDIV: 0029, BLOCK: J
DEED BOOK 4417, PAGE 308
PARCEL ID: 00909658
DISTRICT: 10
ADDRESS: 10200 GAINSBOROUGH ROAD
POTOMAC, MARYLAND 20854
EXISTING USE: RESIDENTIAL
4. ZONING: R-200
5. HORIZONTAL AND VERTICAL CONTROL SHOWN HEREON IS BASED ON A GPS LATITUDE BY KCI TECHNOLOGIES DATED JUNE 2015.
LATITUDE: N39° 01' 20.81" GROUND ELEVATION: 227' AMSL (AVG.)
LONGITUDE: W77° 10' 08.00" PROPOSED STRUCTURE HEIGHT: 89' ASL
TOTAL ELEVATION (AMSL): 316' AMSL
6. TOTAL DISTURBED AREA = 4,920 SF
7. THE PROPOSED FACILITIES WILL CONSIST OF ONE (1) 16' LONG x 10' WIDE CONCRETE EQUIPMENT PAD WITHIN A NEW 35'x20' FENCED COMPOUND. TWELVE (12) ANTENNAS SHALL BE MOUNTED ON A PROPOSED 89'-0" TREEPOLE WITH A RAD CENTER AT AN ELEVATION OF 76'-0" ABOVE GRADE LEVEL FOR THE RECEPTION OF VERIZON WIRELESS TELECOMMUNICATIONS.
8. THE STRUCTURE WILL NOT SUPPORT LIGHTS OR SIGNS UNLESS REQUIRED FOR AIRCRAFT WARNING OR OTHER SAFETY RECORDS.
9. THE APPLICANT WILL PROVIDE A CERTIFICATION FROM A REGISTERED ENGINEER THAT THE STRUCTURE WILL MEET THE APPLICABLE DESIGN STANDARDS FOR WIND LOADS PER THE REQUIREMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION.
10. IF THE ANTENNAS ARE NO LONGER USED FOR TELECOMMUNICATIONS PURPOSES FOR A CONTINUOUS PERIOD OF ONE (1) YEAR, THEY SHALL BE REMOVED BY THE ANTENNA OWNER AT OWNER'S EXPENSE.
11. NO WATER OR SANITARY UTILITIES ARE REQUIRED FOR THE OPERATION OF THIS FACILITY.
12. STORM WATER MANAGEMENT NOTE: NO ADDITIONAL STORM WATER MANAGEMENT IS REQUIRED FOR THIS SITE.
13. BOUNDARY SHOWN PER COUNTY RECORDS. EXISTING SITE FEATURES SHOWN PER SURVEY BY KCI TECHNOLOGIES DATED JUNE 2015.
14. THIS PLAN PREPARED WITHOUT THE BENEFIT OF A TITLE REPORT. PLAN IS SUBJECT TO EASEMENTS AND RESTRICTIONS OF RECORD.
15. ALL DETAILS SHOWN ARE "STANDARD" OR "TYPICAL" FOR REFERENCE ONLY. FOR ACTUAL DETAILS, SEE ARCHITECTURAL, STRUCTURAL, OR CONSTRUCTION PLANS BY OTHERS.
16. STRUCTURAL ANALYSIS/DESIGN TO BE PERFORMED BY OTHERS AT CLIENT AND/OR OWNER'S DISCRETION PRIOR TO COMMENCEMENT OF ANY WORK.
17. THE COMMUNICATION SHALL BE UNMANNED, WITH INFREQUENT VISITS (FOUR OR FEWER PER YEAR) BY MAINTENANCE PERSONNEL, AND WITH ACCESS AND PARKING FOR NO MORE THAN ONE VEHICLE. THE PROPOSED FACILITY IS NOT FOR HUMAN HABITATION AND THEREFORE HANDICAP ACCESS IS NOT REQUIRED.
18. THE PROPOSED COMMUNICATIONS PAD, ANTENNAS AND RELATED MOUNTING DEVICES DO NOT EXCEED TWELVE (12) FEET IN TOTAL HEIGHT.

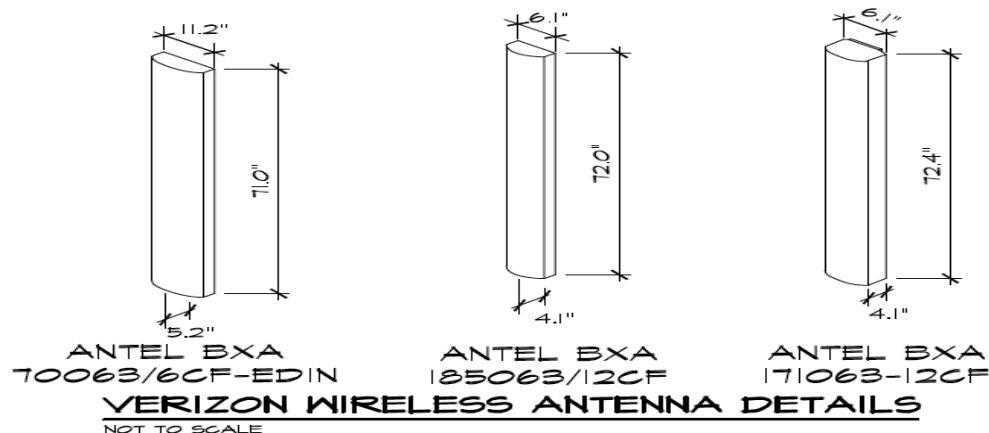
²⁰ Mr. Landfair used a scale ruler to determine the distance from the fence to the sidewalk. He also confirmed at 24 feet wide the driveway aisle is 4 feet more than the 20 feet minimum required under the Zoning Ordinance. Tr. 112.



The support structure will be covered in a material that resembles tree bark. The faux branches will be attached to the support structure beginning at 25-feet above ground level. Within the branches, Verizon proposes 12 antennas that will be centered on the tower at 76-feet above ground level.²¹ According to the Applicants' civil engineer, Brian Siverling, the nine-foot faux tree branches extending above the tower "gives the manufacturer an opportunity to taper the top [of the support structure] and better conceal the antennas at the highest RAD center." Tr. 192. The tower will be designed with sufficient capacity to hold the antennas and cables of at least two other wireless carriers (Co-locators) which will be centered on the monopole at 66 feet and 56 feet.

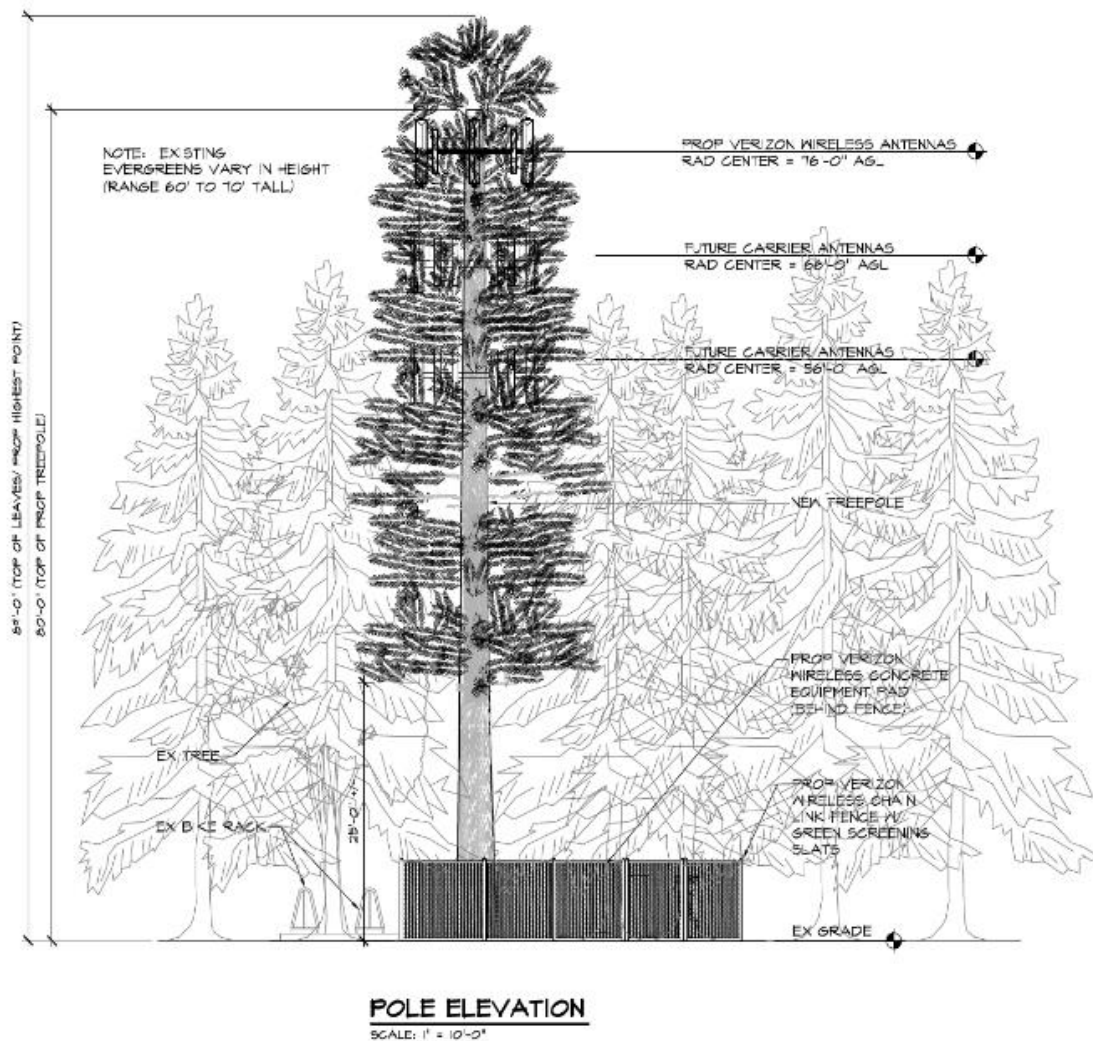
Mr. Siverling, testified that the tower proposed for this site will be custom made. Tr. 184. The site plan drawings and photo simulations submitted with the amended application are based on an image of a similar monopine for another site that the manufacturer, Sabre Industries, provided to Verizon.²²

The design drawings and details for the proposed monopine and antennas are shown below and on the following page (Exhibit 145(e)):



²¹ In the original application, the antennas were centered on the tower at 80'. Exhibits 3, 11(b).

²² Mr. Siverling confirmed that his company, Morris and Ritchie Associates, provided the image of the monopine to Mr. Savard who created the photo simulations submitted with the original and amended applications. Tr. 189-190. He clarified that Verizon intends to construct a similar looking monopine as represented in the image provided by the manufacturer. Technical Staff made this a condition of approval to ensure the proposed monopine will be as full as represented in the photo-simulations. Exhibit 197(a), p. 2.



Because it will be a custom design, Mr. Siverling testified that he could not provide the exact specifications for the proposed monopine. However, he explained the design process and provided general information for an 80-foot tall monopine design. The support structure is a cantilevered structure that is typically assembled in two sections and designed to be wider at the base and taper at the top. With the tower being 80-feet tall, he estimates the base of the support structure will be 54 to 56 inches in diameter and will taper to a diameter of 28 to 30 inches at the top.²³ Tr. 185. It will be attached to a larger base plate that will be bolted to a circular concrete or

²³ On cross-examination by Mr. Chen, he stated that, based on his experience working with this type of structure, the diameter of the base is a "close approximation" to what will be constructed on the site. Tr. 212.

“caisson” foundation, which according to him, is typical for this type of structure. The manufacturer will design the base plate and determine the type of foundation needed for this site based on the results of a geotechnical study that will be conducted at the building permit stage.²⁴ The results of this study will also dictate the actual size and depth of the foundation required to support the proposed monopine.²⁵ However, he estimates a caisson foundation for this type of support structure may be between 7 to 8 feet in diameter. Tr. 184-190; 211- 215.

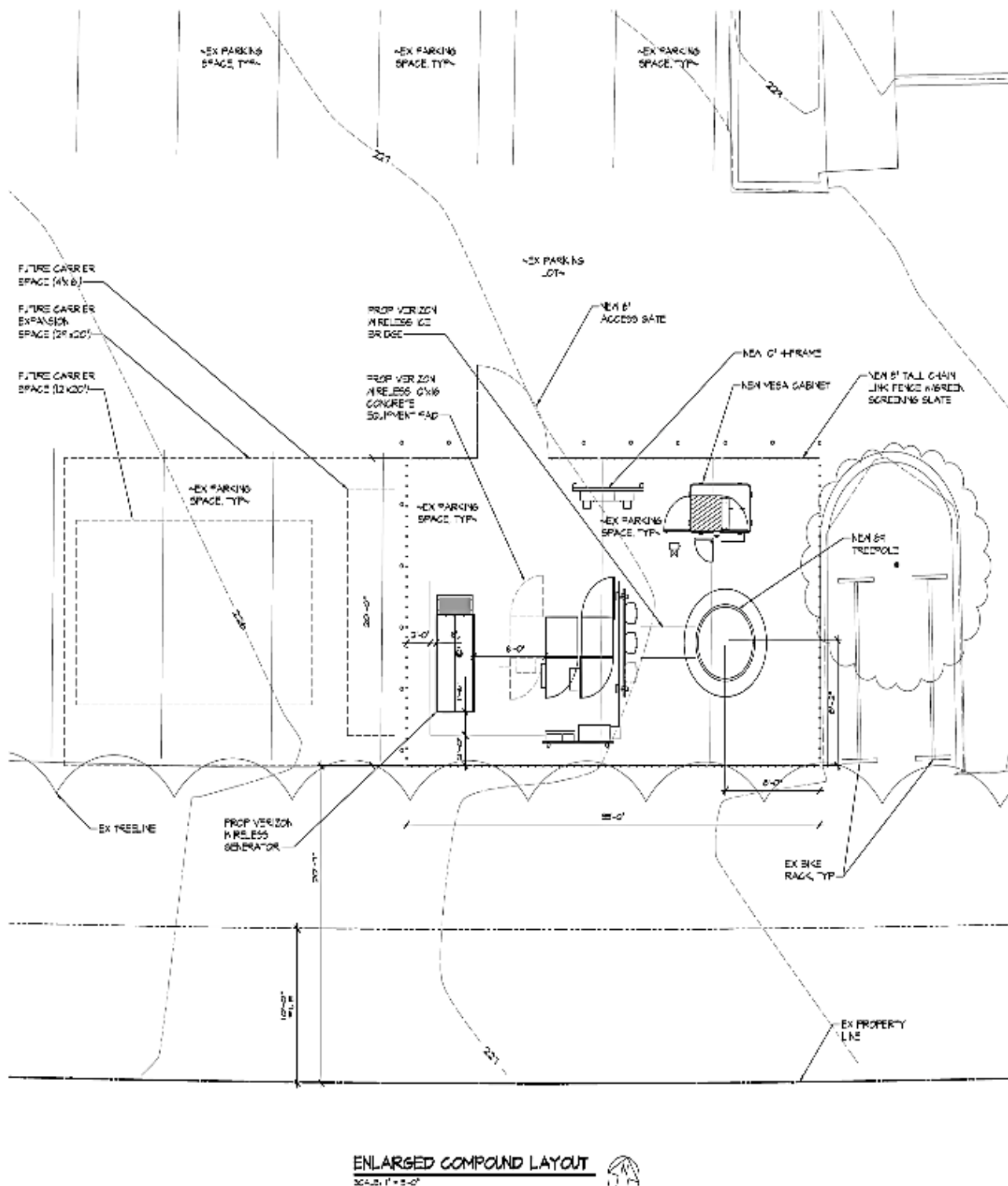
Mr. Siverling stated that a tower failure will typically occur at the joint where the two sections connect so only the top half will fold over onto the lower half of the support structure. Tr. 246-247. According to information received from the manufacturer, the fall radius for an 80-foot tall monopine design is less than 40 feet. Exhibit 242. The tower will be designed to meet all county building code requirements to withstand wind velocities and icing conditions. The pole will meet the loading criteria necessary to support the branches and antennas for carriers that may co-locate on the pole in the future. Tr. 186, 251.

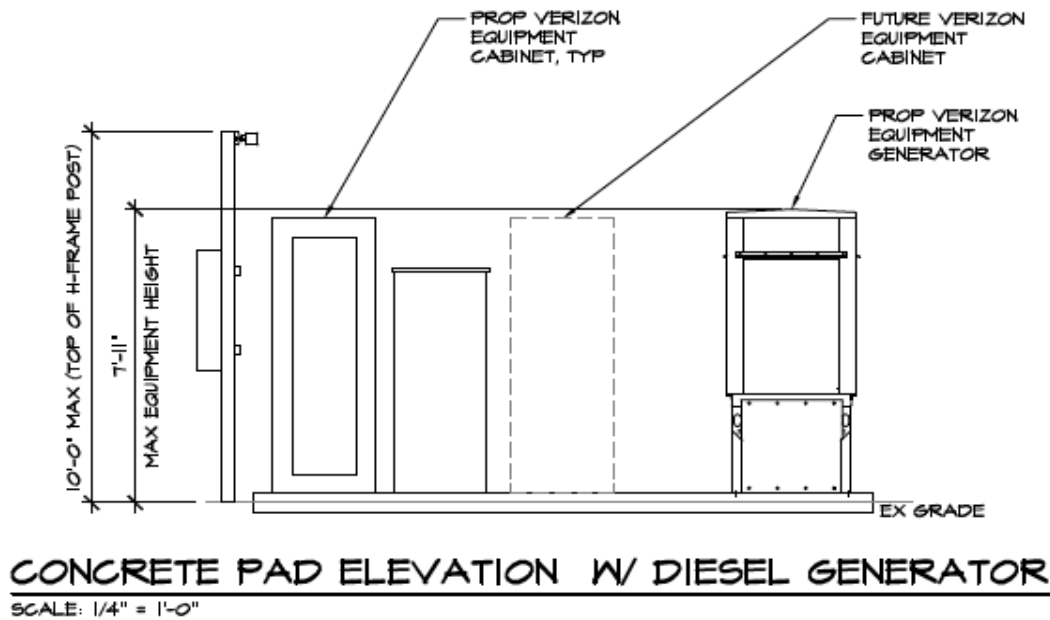
The tower and related equipment will be located within the 700-square foot leased area or “equipment compound,” measuring 35 feet by 20 feet. Equipment within the compound will include a canopied equipment cabinet and back-up diesel generator, both of which will be located on a 10 by 16 foot concrete slab. The maximum height of the equipment cabinet and generator will be 7 feet 11 inches. There is space on the concrete slab for an additional cabinet. A MESA telephone cabinet will also be located within the equipment compound but not on the concrete pad.

²⁴ A geotechnical study involves testing the ground composition of the site to determine what type of foundation is needed for the support structure. Tr. 185. He stated that while the caisson foundation is typical for this type of monopine, there are other foundation options if the geotechnical study results require a different type of foundation is needed for the site. However, he did not discuss any of the other possible options. Tr. 185-187.

²⁵ On cross-examination by Ms. Wetter, Mr. Siverling stated the foundation will be 6 to 12 inches high. Tr. 215.

The equipment compound layout and concrete pad elevation plans are shown below. Exhibit 145(d):





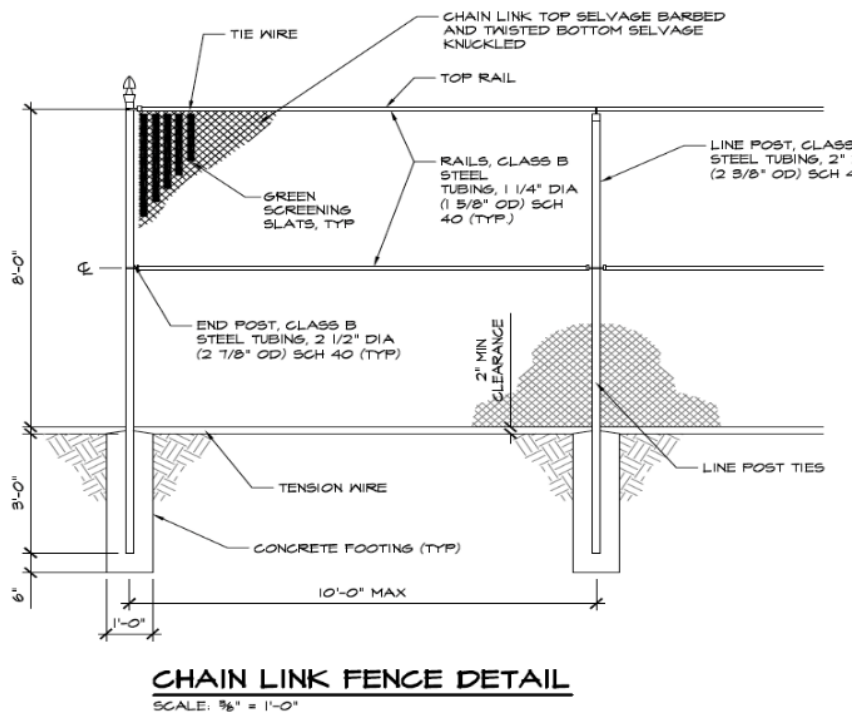
According to Mr. Siverling, the equipment cabinet or cabinets will house the back-up batteries and other equipment.²⁶ The lead batteries are UL-rated and will provide instantaneous back-up power for the tower so there is no loss or interruption of cell service due to a power outage. The number of back-up batteries needed will depend on the final power configuration.²⁷ The diesel generator will provide back-up power to re-energize the batteries when needed and will be designed to comply with the Montgomery County Noise Control Ordinance (Chapter 31B of the County Code). The fuel for the generator will be stored in a 225 gallon UL-rated fuel tank that will be located below ground under the generator engine. The generator will be remotely tested for a period of 30 minutes twice a month.²⁸ Exhibit 145(a), p. 4. The equipment will be equipped with sensors and alarms that are monitored remotely. Tr. 188-189, 227, 239-240, 249.

²⁶ This information was not included in the application or on the site plan. Mr. Siverling stated the documents and details regarding the back-up batteries and diesel generator are part of the building review process and will be shown on construction drawings. Tr. 188.

²⁷ Mr. Siverling stated he knows there are strict safety standards for lead batteries but he could not provide more details on the type, size or safety features of the back-up batteries. Tr. 240; 254-256.

²⁸ The generator can operate on a full tank for approximately 24 hours. If only used for regular testing, Mr. Siverling estimates the tank will need to be refueled once a year. He believes a small tanker fuel truck will have no problems accessing the site. Tr. 245-246.

The equipment compound will be enclosed within an 8-foot chain link with green screening slats to blend in with existing landscaping on the property. A 6' wide gate on the north side of the fence will provide access from the driveway isle into the equipment compound. Details of the fence are shown below (Exhibit 145(e)):



TYPICAL WOVEN WIRE FENCE NOTES

1. GATE POST, CORNER, TERMINAL OR PULL POST 2 1/2" DIA (2 7/8" OD) SCHEDULE 40 FOR GATE WIDTHS UP THRU 6 FEET OR 12 FEET FOR DOUBLE SWING GATE PER ASTM-F1003.
2. LINE POST: 2" DIA (2 3/8" OD) SCHEDULE 40 PIPE PER ASTM-F1003.
3. GATE FRAME: 1 1/4" DIA (1 5/8" OD) SCHEDULE 40 PIPE PER ASTM-F1003.
4. TOP RAIL & BRACE RAIL: 1 1/4" DIA (1 5/8" OD) SCHEDULE 40 PIPE PER ASTM-F1003.
5. FABRIC: 4 GA CORE WIRE SIZE, 2" MESH, CONFORMING TO ASTM-A942.
6. TIE WIRE: MINIMUM 11 GA GALVANIZED STEEL, AT POSTS AND RAILS, A SINGLE WRAP OF FABRIC TIE AND AT TENSION WIRE BY HOE RINGS SPACED MAX 24" INTERVALS.
7. TENSION WIRE: 7 GA GALVANIZED STEEL.
8. BARBED WIRE: DOUBLE STRAND 12-2 1/2" OD TWISTED WIRE TO MATCH WITH FABRIC, 14 GA, 4 PT BARBS SPACED ON APPROXIMATELY 4" CENTERS.
9. GATE LATCH: 1-3/8" OD PLUNGER ROD WITH MUSHROOM TYPE CATCH AND LOCK, KEYED ALIKE FOR ALL SITES IN A GIVEN MTA.
10. LOCAL ORDINANCE OF BARBED WIRE PERMIT REQUIREMENT SHALL BE COMPLIED WITH, IF REQUIRED.
11. CHAIN LINK FENCE SHALL INCLUDE VERTICAL PVC SCREENING SLATS, ALL SIDED, (COLOR: DARK GREEN OR BLACK).

The equipment compound cannot accommodate the ground equipment for future carriers.²⁹

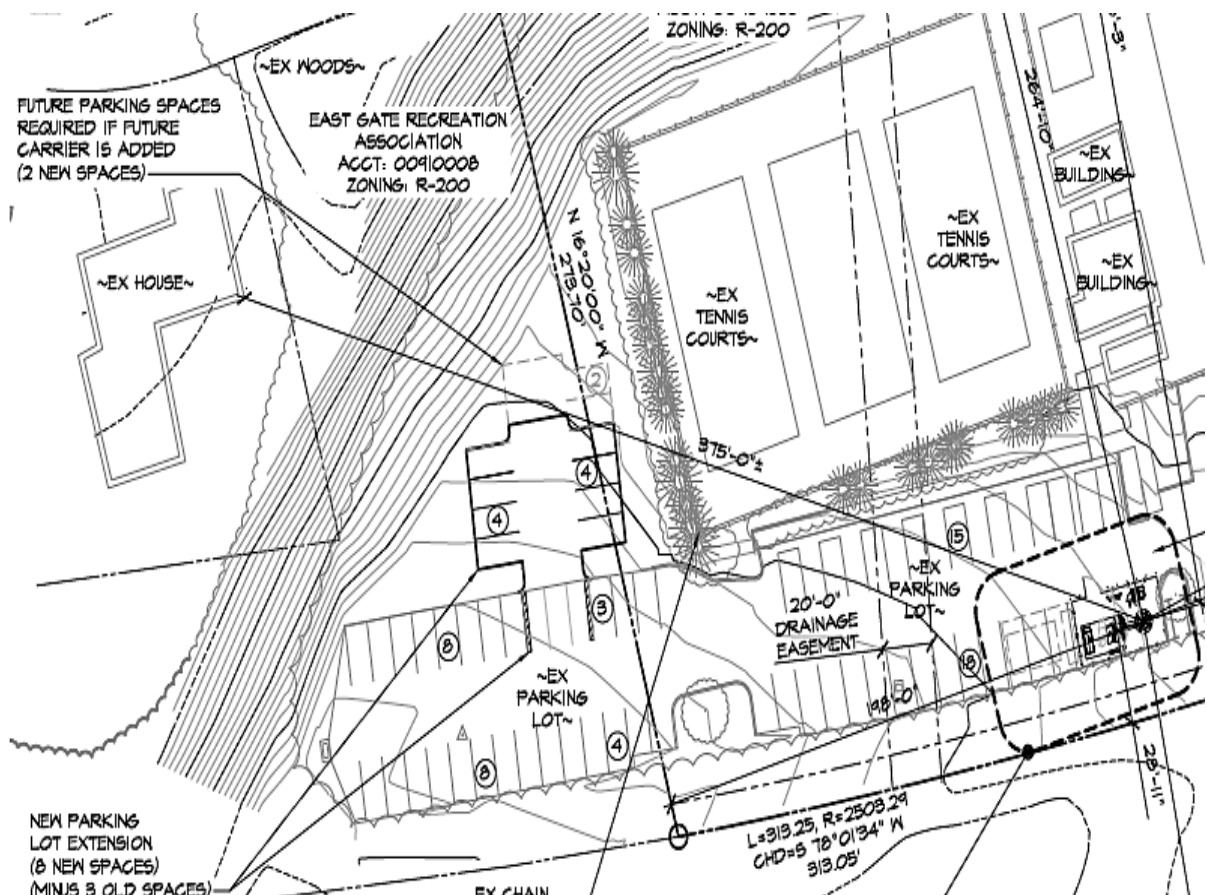
If other carriers decide to co-locate on the pole, the Applicants propose to expand the equipment compound to the west. The expansion area will be approximately 580 square feet, measuring 29

²⁹ While Verizon will lease the space for the antennas on the monopole, the future carriers must lease the ground space for their equipment cabinets from the property owner, East Gate. Exhibit 145(a), p. 6; Tr. 200-201.

feet by 20 feet. With the expansion area, the equipment compound will be 1,280 square feet, measuring 64 feet by 20 feet. The expansion area is shown on the enlarged compound layout reproduced on page 25 of this Decision.

2. Parking

To maintain the 79 parking spaces required under the special exception (S-596), the Applicants propose to reconfigure the existing parking. They will add a new parking area measuring 60 feet by 40 feet in the open space off the existing parking and west of the tennis courts. Tr. 227. The new parking area is shown below on an enlarged view of the area taken from the Site Plan (Exhibit 145(c)).³⁰



³⁰ Condition of approval No. 4 of the Board of Appeals Opinion granting special exception (S-596) states: “[t]he parking area shall accommodate at least 79 vehicles. Configuration of the parking area may be altered from the design shown in Exhibit No. 29, subject to requirements for landscape, screening and lighting.” Exhibit 76(l), p. 9)

Technical Staff advises that the Zoning Ordinance contains no minimum parking requirements for the proposed use. Staff also made the following comments ((Exhibit 197(a), p. 9)):

While the facility is located within the existing parking lot, there is no impact expected to vehicular circulation because the facility is not located within any driving aisle or maneuvering space. Further, the seven parking spaces displaced by the Project are replaced, and one additional parking space is added to accommodate a maintenance vehicle. The existing ADA accessible parking spaces are not impacted. There is no net loss in the required amount of parking for the recreation club.

3. Landscaping and Lighting

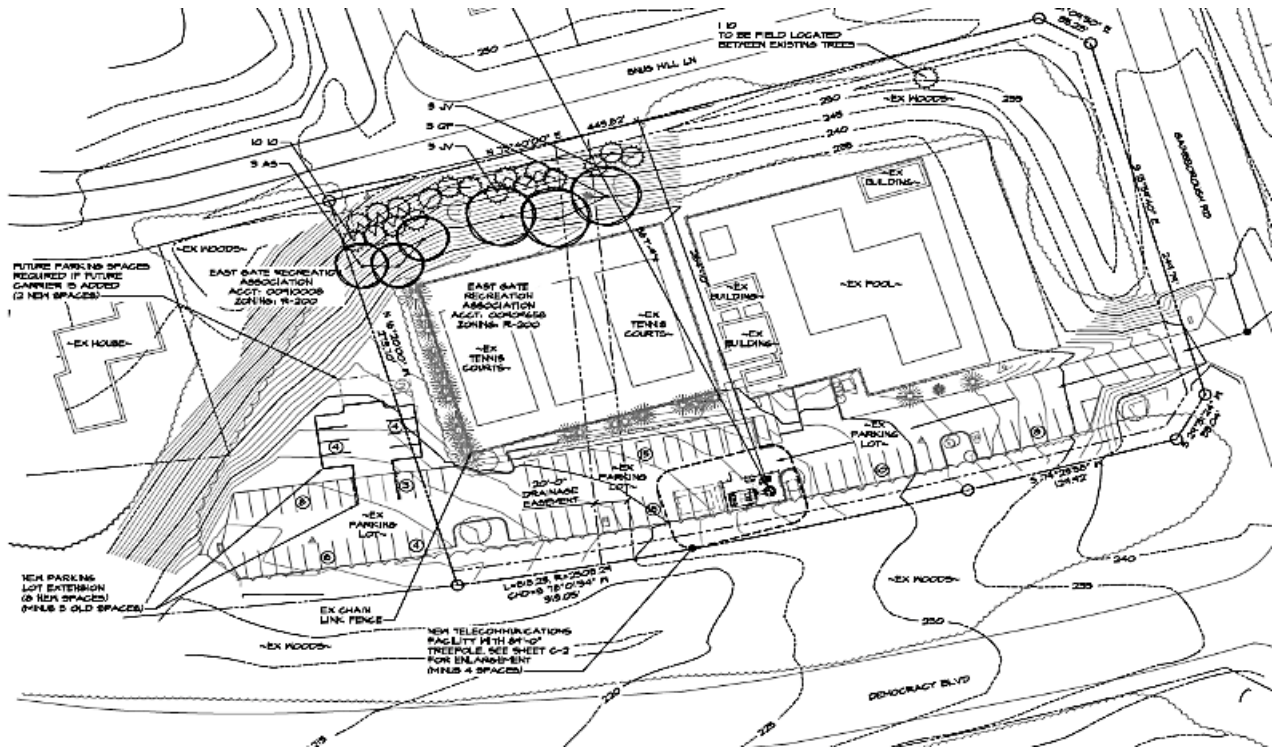
Staff recommended additional landscaping on the slope to the north along Snug Hill Lane to mitigate the visual impact of the proposed monopine on surrounding properties (Exhibit 197(a), p. 15):

[T]he existing perimeter landscape provides adequate screening of the Project from off-site views. The buffer landscaping provides screening from both Gainsborough Road and Democracy Boulevard. The interior placement of the Project within the existing parking lot and away from residential properties to the west and north, buffers the facility from adjacent residential uses. Additionally, new landscaping is proposed along the north property line to further screen and buffer the project from residential areas. By maintaining the existing landscaping, planting additional landscape, and situating the Project as proposed, the Project satisfies landscaping requirements.

Technical Staff describes the proposed new landscaping (Exhibit 197(a), p. 9):

[T]he Applicant will plant six, four-inch caliper trees and 19 evergreens on the north slope of the parcel to further conceal the Project from off-site views. Each tree is expected to mature at 40 to 75 ft. in height and with a canopy spread of 25 to 50 ft. [and] the evergreens are expected to mature at 15 to 65 ft. with a spread of 10 to 20 ft.

The Landscape Plan and the Planting Schedule are depicted on the next page (Exhibit 145(g)):



PLANTING SCHEDULE

Trees								
Symbol	Quantity	Botanical Name	Common Name	Size	Note	Mature Height	Mature Spread	
AS	3	Acer saccharum 'Green Mountain'	Green Mountain Sugar Maple	4" Caliber	B&B	43'-60'	25'-45'	
OP	3	Quercus phellos	Willow Oak	4" Caliber	B&B	43'-75'	25'-50'	
Evergreen Tree								
Symbol	Quantity	Botanical Name	Common Name	Size	Note	Mature Height	Mature Spread	Recommended Spacing for Screening Hedge
JV	8	Juniperus virginiana	Eastern Red Cedar	8"-10' Ht.	B&B/CG	33'-65'	10'-20'	10'-14' O.C.
IO	11	Ilex opaca 'Miss Helen'	Miss Helen American Holly	8"-10' Ht.	B&B/CG	15'-25'	10'-18'	10'-14' O.C.

The Applicants filed a Forest Conservation Exemption and Simplified Natural Resources Inventory/Forest Stand Delineation for the subject site (NRI/FSD No. 42017030E) which is reproduced on pages 15-16 of this Decision. It was approved by Technical Staff on October 16, 2016 (Exhibit 14):

The project meets the requirements of the Montgomery County Code, Chapter 22A (Forest Conservation Law), Section 22A-5(t) for modifications to existing, non-residential developed property. No forest will be cut or cleared as part of the project. To date, no forest has been removed from the property. The subject property is not within a special protection area. The project maintains the development and does not require approval of a new subdivision plan. The project increases the net developed area by less than 50 percent.³¹

³¹ The total disturbed area noted on the amended site plan is 4,920 sq. ft. Exhibit 145(c).

The NRI/FSD plan notes confirm there no wetlands, streams, 100-year flood plains or rare, threatened or endangered species on the property.³² *Id.*

Staff advises that there are no outdoor lighting requirements for the proposed facility and no lighting is proposed. Exhibit 197(a), p. 16. However, a sign no larger than 2 square feet identifying the owner and maintenance service provider will be affixed to the support structure or equipment building in accordance with the requirements of Section 59.3.5.2.C.2.b.x of the Zoning Ordinance (2014). Exhibit 145(a), p. 7.

4. Operations

The proposed facility will be unmanned and in continuous operation 24 hours a day, seven days per week. The only visits to the site will be for emergency service and regular maintenance and inspection which Applicants report will be four times a year. Transportation Staff reports (Exhibit 255):

Traffic Concepts submitted a Traffic Exemption Statement on August 3, 2016 for a Verizon Telecommunications Tower planned at 10200 Gainsborough Road, Potomac, Maryland. I [Laura K. Hodgson] have reviewed and approve the Traffic Exemption Statement, which was reviewed under the 2012-2016 Subdivision Staging Policy. The applicant has proven that the proposed use generates fewer than 30 peak hour trips. Therefore, the Local Area Transportation Review (LATR) test has been satisfied and Planning Staff can make an Adequate Public Facilities (APF) finding for the proposed development. Furthermore, the project generates fewer than 3 trips per day, therefore the project is exempt from the Transportation Policy Area Review (TPAR).

5. Setback Waiver Request

Section 59.3.5.2.C.2.b.ii. of the Zoning Ordinance states:

- ii. A Telecommunications Tower *must be set back from the property line*, as measured from the base of the support structure, as follows:

³² Applicants also submitted a letter from the Maryland Department of Resources confirming there are “no State or Federal records for rare, threaten or endangered species within the boundaries of the project site as delineated.” Exhibit 83(a).

- (b) In the Agricultural, Rural Residential, and Residential Detached zones, a distance of one foot for every foot of height *or* 300 feet from an existing dwelling, *whichever provides the greater setback.* (*Emphasis added*)

The tower is approximately 28 feet 11 inches from the southern property line (along Democracy Boulevard) and is more than 80-feet from all other property lines. It is also more than 300-feet from existing residential dwellings on all sides of the property.

The tower setbacks chart taken from the site plan is shown below (Exhibit 145(c)):

TOWER SETBACKS	REQUIRED	PROPOSED	WAIVER REQUEST
FROM NORTHERN PROPERTY LINE	80'-0"	264'-10"	NONE
FROM SOUTHERN PROPERTY LINE	80'-0"	28'-11"	51'-1"
FROM EASTERN PROPERTY LINE	80'-0"	269'-5"	NONE
FROM WESTERN PROPERTY LINE	80'-0"	198'-0"	NONE
FROM CLOSEST RESIDENTIAL DWELLING	300'-0"	304'-4"	NONE

The amended application did not change the location or size of the equipment compound as proposed in the original application. Staff reports the need for a setback waiver was “inadvertently overlooked in the original filing.”³³ Exhibit 197(a), p.3. However, it was not until May 2017, that Staff identified this oversight and informed Applicants that the application did not comply with the one foot for every foot of height (one to one) minimum property line setback under Section 59.3.5.2.C.2.b.ii.(b) of the Zoning Ordinance (2014). Staff advised that because there are no dwellings located within 300-feet of the proposed location, the minimum property line setback is the height of the tower, which Staff determined to be the height of the support structure and antennas. Assuming the proposed height to be 80 feet, Staff advised the Applicants a waiver from the property line to the south was needed. Exhibit 141(c).

³³ In the first Staff report filed December 9, 2016, Staff found that setback under Section 59-3.5.2.C.2.b.ii.(b) was satisfied because “the Project is located more than 300 ft. from all existing dwellings.” Exhibit 75, p.22.

Applicants provided the following explanation as to why a setback waiver was not requested in the original application (Exhibit 145(a), p. 7)):

The subject property, in the R-200 zone, falls into the Residential Detached zone. A plain reading of the code indicates that the setback requirement is an “or.” The use of the “or” indicates the intent that the greater of the two setbacks must be met. It is Applicant’s position that, as proposed and originally recommended for approval by Planning Staff (*see*, Figure 4, Page 7, Report and Recommendation dated December 9, 2016), the facility meets this test by being more than 300’ from all residences – the 300’ being the greater of the two setback options. Based on the original recommendation of approval from Planning Staff, Applicant was under the impression that Applicant and Staff agreed on the reading of the setback provision.

However, Applicant also understands that Planning Staff is preparing a revised recommendation concerning the setback. Planning Staff has advised that it now has a concern regarding the setback along the southern property line at Democracy Boulevard. In order to meet the one-to-one setback there, a waiver of 51’1” from the 80’ setback to the property line at Democracy Boulevard is being requested.

Applicants renewed this argument at the hearing and argued that the Hearing Examiner could find that a setback waiver is not needed for the reasons described above.

Applicants’ “plain reading” of the setback requirements ignores the preceding section (ii) which clearly identifies that there is a minimum property line setback for a telecommunications tower in a residential zone. The minimum setback is from the base of the tower to the property line. The criteria for determining how far the tower must be setback *from the property line* is provided in sub-section (b) which requires “a distance of one foot for every foot of height *or* 300 feet from an existing dwelling, whichever provides the greater setback.”

The greater of the two setbacks is not meant to be an “option” whereby an Applicant can choose a location on the property where the tower will be more than 300-feet from the nearest dwelling. To do so ignores the minimum property line setback and the “whichever provides the greater setback” phrase. The minimum property line setback distance to an existing dwelling is measured from the base of the support structure where it meets the one-to-one minimum property line setback. The property line setback may only be increased if there is an existing dwelling

located within 300 feet of where the one-to-one setback is met. The closest dwelling is 304 feet 4 inches from the proposed location. Thus, because there are no dwellings located within 300 feet of the proposed location the one-to-one setback provides the greater setback to the property line.

Applicants reading of the setback requirement would allow towers to be located on smaller lots. It would also allow tower locations to be closer to the property line based on the actual distance of dwellings that are more than 300-feet from the proposed location. For instance, based on Applicant's reading of the setback requirements the proposed tower could arguably be located even closer to the property line if the closest existing dwelling was more than 328 feet from the proposed location. Applicants' interpretation of Section 59.3.5.2.C.2.b.ii.(b) of the Zoning Ordinance (2014), effectively eliminates the property line setback for a telecommunication tower and eviscerates the very purpose for minimum property line setback requirements: to minimize visual and other adverse impacts from the significant height of the tower on adjacent properties.

Planning Coordinator Gregory Russ provided an explanation and comparison of the minimum property line setback requirements under the 2004 and 2014 Zoning Ordinances, as follows (Exhibit 136(b)):³⁴

Under the previous Code [2004], in the Agricultural and Residential Zones, Section 59-G-2.58(a)1) states that a support structure must be set back from the property line a distance of one foot from the property line for every foot of height of the support structure and a distance from any off-site dwelling (Section 59-G-2.58(a)(2)).

Under Section 3.5.2.C.2.b.ii of the new Code, in the Agricultural, Rural Residential, and Residential Detached zones, a Telecommunications Tower must be set back from the property line, as measured from the base of the support structure, a distance of one foot for every foot of height or 300 feet from an existing dwelling, whichever provides the greater setback.

³⁴ Marilyn Leon, a resident who lives at 10209 Gainsborough Road retained the services of a Sue Present, an individual familiar with zoning issues, to review the application for compliance with the setback requirements. Ms. Presents drafted a memorandum of her research which included conversations and e-mail correspondence with Planning Staff, Gregory Russ and Pamela Dunn addressing the setback requirements under the 2014 Zoning Ordinance rewrite. Exhibit 136(b). Ms. Present did not testify at the hearing.

My read on the current setback requirement is very similar to the Old Code (maybe slight more stringent in the New Code in terms of the 300 feet distance from an existing dwelling versus a 300 feet distance from any off-site dwelling.)

* * * * *

Remembering subsection ii as the starting point, the phrase “whichever provides the greater setback” relates to the greater setback from the property line. For example, if [the] tower is 120 feet, then the starting setback is 120 feet from all property lines. If there is no dwelling within 300 feet of the proposed tower location, then 120 feet is your minimum tower setback from the property lines. If there is an existing dwelling, for example, that is 200 feet from the proposed tower location, then the tower would need to be relocated to increase the setback along that particular property line by 100 feet (to set back 300 feet from the dwelling) thereby increasing the setback from the property line from 120 to 220 along that border. Note: The tower must continue to be set back from all other property lines a distance of 120 feet if there is no dwelling within 300 feet along those borders.

The Hearing Examiner agrees with Planning Staff Gregory Russ that a clear reading of the Section 59.3.5.2.C.2.b.ii.(b) of the Zoning Ordinance provides the same setback protection from the property line and from an existing dwelling as under the previous Zoning Ordinance. The 2014 Zoning Ordinance rewrite did not eliminate the minimum property line setback. Thus, the amended application does not meet the setback requirements under Section 59.3.5.2.C.2.b.ii.(b) of the Zoning Ordinance and a setback waiver from the property line to the south is needed.

However, because the property line setback is based on the height of the tower, the extent of the waiver required depends on whether the additional 9 feet of height (stemming from the faux branches) is counted toward the height of the tower. This is pertinent because in order to request a setback waiver, there has to be a place on the property where the setback requirements can be met. Because the property is so narrow, there is no place on the property where all setbacks requirements can be met for an 89-foot tall monopine, thereby eliminating the Applicants’ ability to request a setback waiver. In this case, there is only a small sliver of land on the site where Applicants assert all setback requirements could be met for an 80-foot tall monopine providing them with the ability to request a setback reduction. The Hearing Examiner addresses both issues.

a. Height of the tower;

Applicants argue that the height of the tower for purposes of determining the property line setback is the height of the support structure without the nine feet faux branches, or 80-feet. Mr. Landfair testified that in his opinion the antennas and faux branches are attachments to the support structure that should not count as part of the height. More specifically, he stated (Tr. 874-876);

I consider those branches to be attachments to be appended to the pole structure, but they are not a part of the physical structure itself. They are what is attached to the physical structure, along with the cables and other equipment that is necessary to make the facility function.

Mr. Landfair admitted that he was unaware of how faux branches and the support structure were considered in prior OZAH reports. Tr. 856. However, he indicated that Staff agreed with his interpretation that the setback is based on the height of the support structure which is 80 feet tall. Tr. 875-876.

In response to a request from the Hearing Examiner for clarification on how Staff determined the height of the tower, Staff provided the following explanation in an e-mail dated July 28, 2017 (Exhibit 162):

Concerning how height is measured for a cell tower project, we include the support structure and antennas. In the past, we have not included appurtenant equipment such as a lightning rod. Therefore, it would be inconsistent to include faux tree branches in the calculation of maximum height. Further, where the code discusses maximum height, the terms “support structure and antennas” are used [(59.3.5.2.C.2.b.iii)]. Therefore, as indicated in the applicant’s plan, the maximum height proposed is 80 feet.

However, Technical Staff did not refer to other Staff recommendations or OZAH reports which support how height has been determined in the past to establish the property line setbacks without consideration of the faux branches. Staff failed to provide a basis for comparing a lightning rod as akin to faux branches as exempt from the maximum height restrictions. Staff did not address the issue of the faux branches in the Staff report. Tr. 877.

The Opposition submitted examples of OZAH reports where property line setback was based on the overall height of the tower including the faux branches. In Board of Appeals special exception S-2706, Verizon Wireless and Wesley Grove United Methodist Church, the application proposed an 80-foot tall monopole with faux branches extending the overall height to 87 feet. Exhibit 229(b). The property line setback was 87 feet. In Board of Appeals special exception S-2729, Verizon Wireless and MNCPPC, the property line setbacks were similarly determined based on the actual height of the monopole with the faux branches. In that case, the application proposed a 134-foot tall monopole with faux branches extending the overall height to 140 feet. The required property line setbacks were determined to be 140-feet. Exhibit 229(c).

Applicants argue that these cases are not relevant because the actual setbacks in both cases were much larger than the overall height of the tower. Further, Applicants argue that because the setbacks were not an issue, there are no findings in either case addressing setbacks or whether the support structure height includes faux branches. Finally, Applicants argue that the faux branches are used to camouflage the support structure which Applicant maintains is 80 feet and the basis for determining the property line setback. Tr. 950.

Section 59.3.5.2.C.2.i of the Zoning Ordinance states, in pertinent part:

Telecommunications Tower means any structure other than a building, providing wireless voice, data or image transmission within a designated service area. Telecommunications Tower consists of one or more antennas attached to a *support structure* and related equipment[.] (*Emphasis added*)

A structure is defined as “a combination of materials that requires permanent location on the ground or attachment to something having permanent location on the ground, including buildings and fences.” Section 59.1.4.2 of the Zoning Ordinance (2014). The proposed support structure is being camouflaged as a pine tree which necessarily includes faux branches. The branches are an extension of the support structure which by definition includes attachments.

Therefore, the height of the support structure includes the branches which extend the overall height of the support structure to 89 feet.

Accordingly, the Hearing Examiner finds that the property line setback in this case is 89 feet. Based on the evidence of record, there is no place on the property where the support structure can meet all required setbacks for an 89-foot monopine, thereby eliminating Applicants' ability to seek a setback reduction.

Even if the Hearing Examiner agreed with the Applicants that faux branches do not count in determining the property line setbacks, there is insufficient evidence to find that there is a location on the property where all required setbacks can be met for an 80-foot monopine.

b. Waiver Request:

Section 59-3.5.2.C.2.b.ii. of the Zoning Ordinance (2014), states in pertinent part:

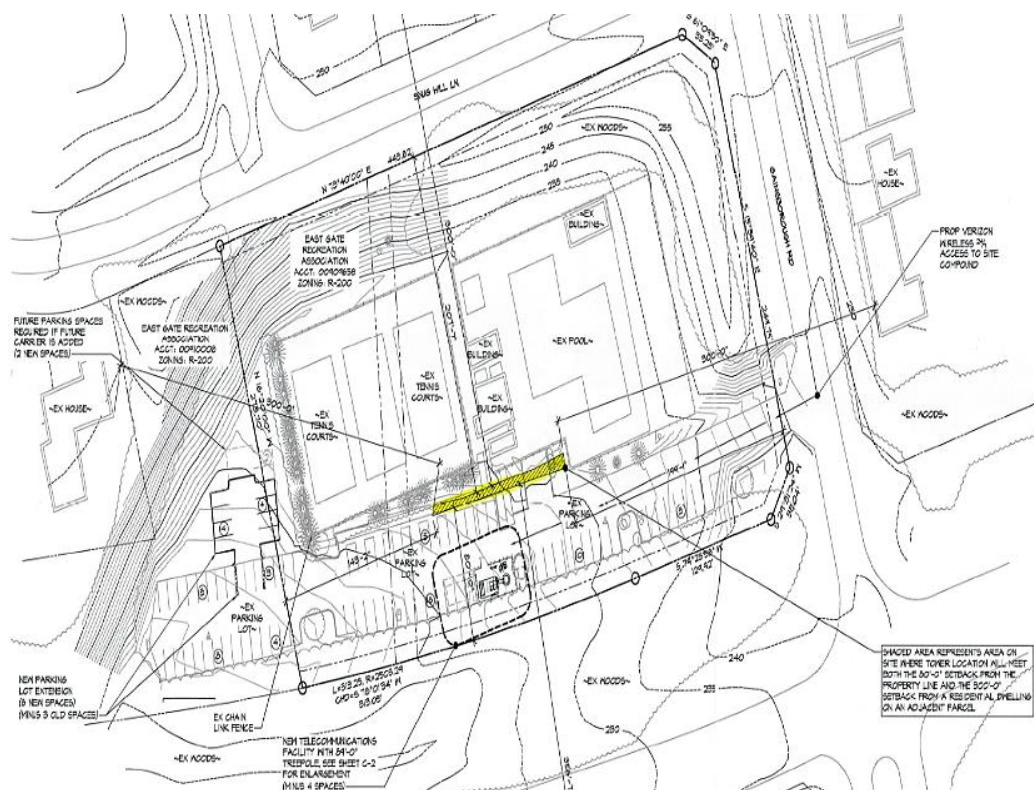
- (d) The Hearing Examiner may reduce the setback requirement to not less than the building setback for a detached house building type in the applicable zone or to a distance of one foot from an off-site dwelling for every foot of height of the support structure, whichever is greater, if evidence indicates that a reduced setback will allow the support structure to be located on the property in a less visually obtrusive location than locations on-site where all setback requirements can be met after considering the height of the structure, topography, existing vegetation, nearby residential properties, and visibility from the street. *A reduced setback may be approved only if there is a location on the property where the setback requirements can be met.* (Emphasis added)

Applicant is requesting a 51 foot 1 inch reduction of the one-to-one setback from the southern property line in order to permit the tower and equipment compound to be located in the parking lot of the Swim Club. Applicants contend that at the proposed location the tower will be less visible and farther away from homes surrounding the property. Exhibit 145(a), p. 2. Applicants describe the impacts of the tower at the alternate location and the benefits of granting a setback waiver so it can be located in the parking lot as proposed (Exhibit 145(a), p.8):

As shown on [the site plan], there is another location at this site where the proposed facility could be located, where all setbacks could be met. *See*, cross hatched area on [the site plan]. Siting the facility somewhere within this location would [] result in the following: 199'-1" from the eastern property line (to Gainsborough Road), 207'-7" from the northern property line (to Snug Hill Lane), 143'-2" from the western property line, and 80'-10" from the southern property line (to Democracy Boulevard). In addition, it would be 300' feet from the closest residential dwellings (on Gainsborough Road, Snug Hill Lane).

Although the setbacks might be met, the site would not be less visually obtrusive; in fact, it would lose the natural screening to be planted along Democracy Boulevard, would lessen the impact of the additional screening to be planted along Snug Hill Lane, would put the facility closer to all of the homes surrounding the property along Snug Hill Lane and Gainsborough Road (rather than these homes being farther from the facility, with the closest dwelling across from Democracy Boulevard), and as a tree pole would actually be more visually obtrusive in the alternate location closer to the pool and tennis courts where there are no existing trees, than it would be in the original proposed location. As a result, all of the mitigating features which led to the choice of the original location would be lost, and the facility would become visually intrusive.

The alternate location or hatched area (yellow highlight) where the required setbacks could be met is shown below on the site plan (Exhibit 145(f)):



Mr. Siverling testified that the widths of the hatched area from north to south are 6 feet near the tennis courts to the west and approximately 8 feet at the pool entrance to the east. This area is intended to show where the support structure without the related equipment could meet the required setbacks for an 80-foot tall tower. Tr. 195-196. In his opinion, the equipment does not have to be located next to the support structure. The cables and conduits connecting the support structure and equipment could be buried. Tr. 198.

Mr. Siverling could not provide exact measurements for the circumference of the support structure (pole), size of the base plate, and type and size of the foundation that will be required to support the tower because it will be custom made for the site. However, based on his experience Mr. Siverling estimated that the circumference for the base of the support structure may be between 54 to 56 inches in diameter.³⁵ As proposed, it will be attached to a larger base plate which will be anchor bolted to a circular concrete or “caisson” foundation he said is typical for this type of structure. Both will be designed by the manufacturer based on the results of a geotechnical conditions study which is performed at the building permit stage.³⁶ He estimates a caisson foundation for this type of support structure may be between 7 to 8 feet in diameter. Tr. 184-190; 211- 215.

In response to Mr. Chen’s question whether the support structure, including the foundation, will fit within the hatched area, Mr. Siverling stated “[a]gain, do we have the actual design, we

³⁵ On cross-examination by Mr. Chen, Mr. Siverling stated that based on his experience working with this type of structure the stated diameter of the base is a “close approximation.” Tr. 212. He noted there are other foundation options if the results of the study show a circular caisson is not an appropriate foundation for this site. Further, he is not aware of issues with the soil which are noted in the Board of Appeals opinion granting the special exception (S-596) to operate a swim club. Tr. 215. Of note, summarized testimony received at the hearing before the Board reflects: “David Marshall, the architect and planner responsible for the building and site plans, testified that portions of the site where the pool and tennis courts are to be located had be used by the developer for dumping spoilage, and could not support substantial structures.” Exhibit 76(l), p. 3.

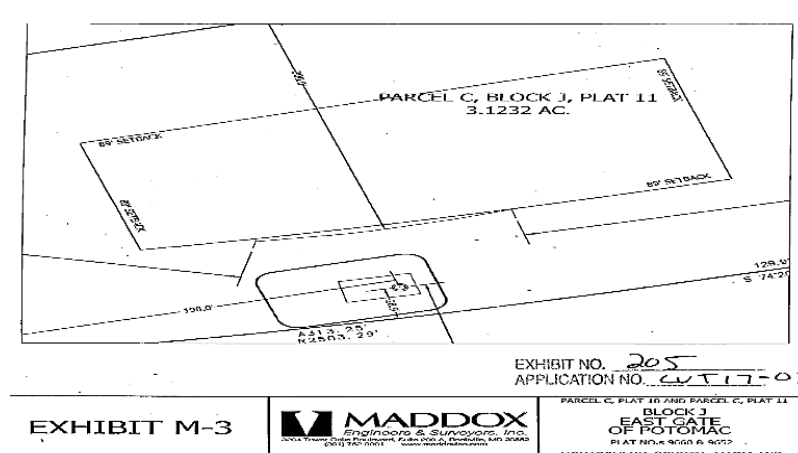
³⁶ On cross-examination by Ms. Wetter, Mr. Siverling stated the foundation will be approximately 6 to 12 inches high. Tr. 215.

don't know. It's very close.”³⁷ Tr. 229-230. He clarified that he did not study the hatched area to see where the support structure and foundation could fit.³⁸ Tr. 251. The hatched area was identified based on a survey of the property, and the measurements were taken from the center of and not the base of the support structure because he does not know the circumference of the base. Also, he testified that he did not do a setback analysis for an 89-foot tower. However, he confirmed there is no place on the property where all the required setbacks could be met for an 89-foot tower. Tr. 217-219.

The Oppositions' expert land surveyor, Russell Reese, conducted a setback study. He surveyed the property to verify the boundaries for the property as shown on the site plan and to determine required setbacks for both an 89-foot tower and an 80-foot tower. Mr. Reese created separate graphic representations of his survey results.

The survey drawing showing the location of the required setbacks for an 89-foot tower is shown below (Exhibit 205). The hatched area disappears confirming Mr. Siverling's testimony that there is no place on the property where the required setbacks for an 89-foot tower can be met.

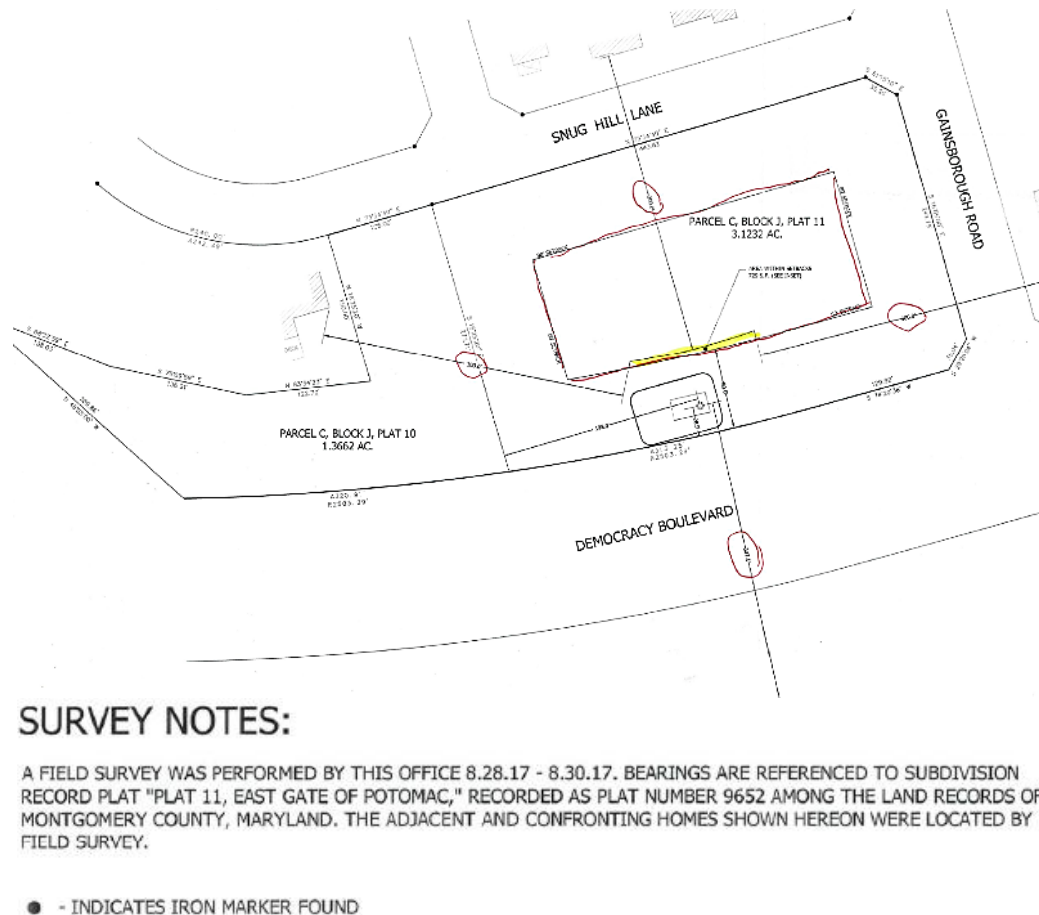
Tr. 217-219.



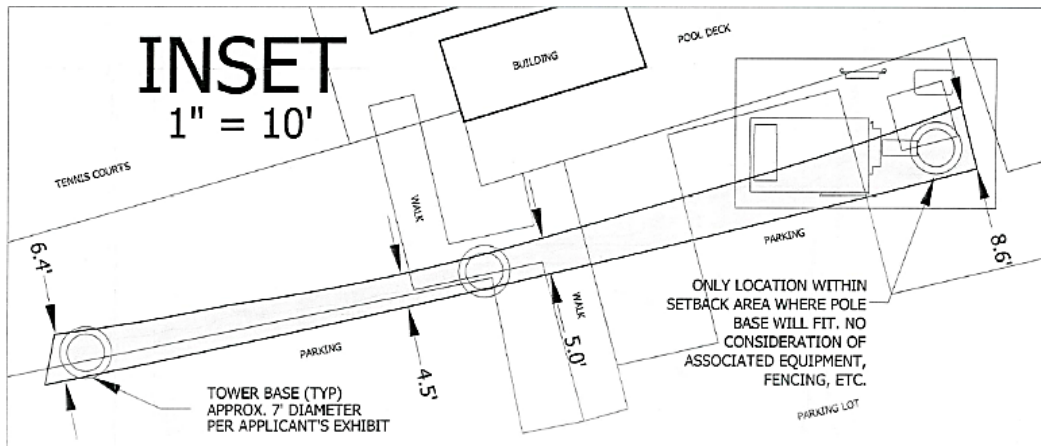
³⁷ Based on the question, the Hearing Examiner believes Mr. Siverling may have said (there being a transcription error) “until we have the actual design” instead of “do we have the actual design.” Either way, the Hearing Examiner interprets Mr. Siverling's response to mean he cannot know if the support structure will fit into the hatched area until it has been designed.

³⁸ Mr. Siverling stated the Setback Exhibit (145(f)) was an academic exercise to show there is a place on the property where the required setbacks could be met. There is no intent to locate the support structure at the alternate location. Tr. 255.

As shown below, the 80-foot property line setback is the rectangular area in the middle of the property. The hatched area is highlighted yellow, and the 300-foot setbacks from dwellings on all sides are circled in red ink. Based on Mr. Reese's survey of the property, he determined that the closest dwelling to the south from the proposed location to the south is 307 feet 1 inch and not 304 feet 4 inches as the Site Plan (Exhibit 195(a)):



Mr. Reese testified that based on his survey of the property, he determined that the width of the hatched area is approximately 8 feet 6 inches at the pool entrance (eastern end) and it narrows to 5 feet at the clubhouse, 4 feet 5 inches at the tennis court sidewalk and 6 feet 4 inches just past the tennis courts entrance (western end). Based on these measurements, the hatched area is approximately 729 square feet. Tr. 543-538. The hatched area details taken from the Survey Exhibit are shown below (Exhibit 195(a)):



The Opposition disagrees with Mr. Siverling and contends that by definition the support structure and equipment must meet the setbacks at the alternate location in order to request a setback waiver. Further, the Opposition contends that the measurements on the site plan are not accurate because Mr. Siverling measured from the center and not the base of the support structure. Tr. 934.

The Hearing Examiner is not persuaded by the Opposition's more restrictive reading of the setback requirement of Section 59.3.5.2.C.2.b.ii of the Zoning Ordinance to require proof that the related equipment must also fit within the hatched area in order to request a setback waiver. Section 59.3.5.2.C.2.b.ii of the Zoning Ordinance states "[a] telecommunication tower must be setback from the property line as measured from the base of the support structure[.]" While the definition of a telecommunications tower includes antennas and related equipment, the setback requirements clearly states that the distance from the property line is to be measured from the base of the support structure. There is nothing to suggest the fence and related equipment must meet the same setback requirements for a telecommunications tower. Therefore, the Hearing Examiner finds that the support structure and its foundation must meet the required setbacks at the alternate location or in this case they must fit within the hatched area.

The Hearing Examiner finds merit in the Opposition's concern over the accuracy of the measurements on the site plan since they were taken from the center of and not the base of the support structure. Section 59.3.5.2.C.2.b.ii.(d) of the Zoning Ordinance (2014), states in pertinent part: "A reduced setback may be approved only if there is a location on the property where the setback requirements can be met." The only location the proposed tower "might" fit in the hatched area is at the pool entrance which Mr. Reese determined to be approximately 8 feet 6 inches wide. Thus, it is arguable a few feet gained by measuring from the center of the support structure to the property line may shift the support structure so that it does not fit within the hatched area.

Because the proposed support structure has not been designed, Mr. Siverling by his own testimony does not know *if* the support structure and foundation will fit within the hatched area. While he thinks it *may* be a close fit based on the dimensions of a similar support structure, he was clear in his testimony that each structure is custom made based on the results of a geotechnical condition study for the specific site. Tr. 229-230. Without the design and dimensions of the actual support structure proposed for this site, there is no way to conclude the support structure and foundation can meet the required setbacks at the alternate location.

Even if the Hearing Examiner found the evidence supported the opposite conclusion, the Hearing Examiner disagrees with Staff that the tower at the proposed location is visually less obtrusive. The photo simulations showing the monopine at the proposed location and at the alternate location are reproduced and discussed in the next section.

D. Visual and Property Value Impact

The most significant issue regarding a telecommunications tower in a residential zone is its visual impact upon the neighbors. In this case, the Opposition presented expert testimony that the proposed facility will also negatively impact property values. Both issues are discussed here.

a. Visual Impact

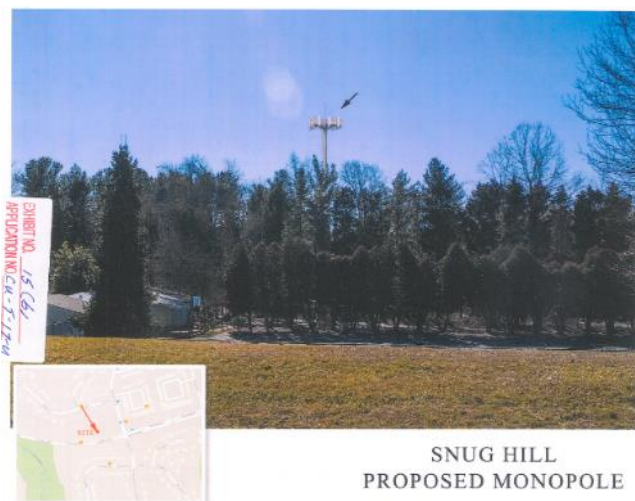
To evaluate the visual impact, Applicants submitted photo simulations of the proposed tower at the proposed location from five different locations in the neighborhood. The photographs of the site were taken based on the results of an on-site balloon test conducted by Philip Savard, an expert in digital simulation photography. Mr. Savard testified that a balloon test involves raising a 5' helium balloon to the height of the proposed tower. A laser range finder was used to determine and maintain the height of the balloon at 89 feet. Tr. 171-173. He drove within a 1 mile radius of the site and took photographs from five locations where he could see the balloon. An image of a monopine (not a real pine tree) provided by Verizon was simulated into the photographs. The locations are noted on a map located at the bottom of each photograph. Tr. 149-150, 174-176.

The original simulations of the monopole shown in the photographs taken from Snug Hill Lane, identified as view #1 (Exhibit 15(b)), and from Gainsborough Road, identified as view #5 (Exhibit 15 (f)), show the monopole located within a stand of existing trees, rather than the proposed location within the parking lot of the Swim Club. Verizon revised these simulations to depict the tower in the correct location. Exhibit 74(a)(i) and (ii). The original (left column) and revised (right column) photo simulations are shown below and following page:

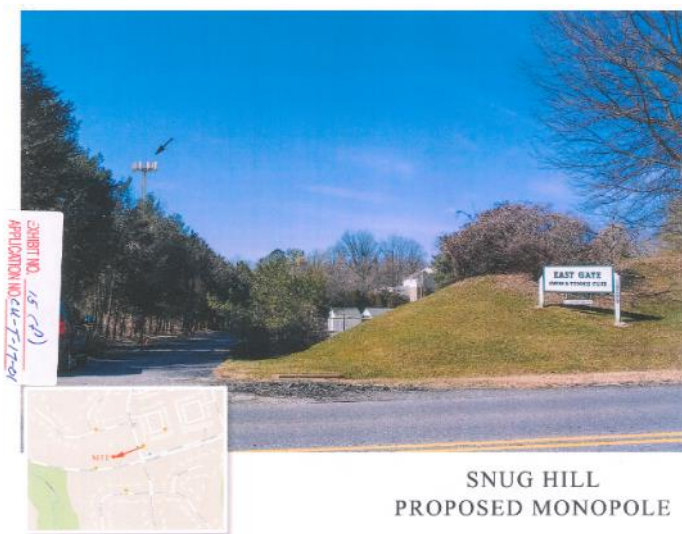
View # 1 – Snug Hill Lane

Original – wrong location

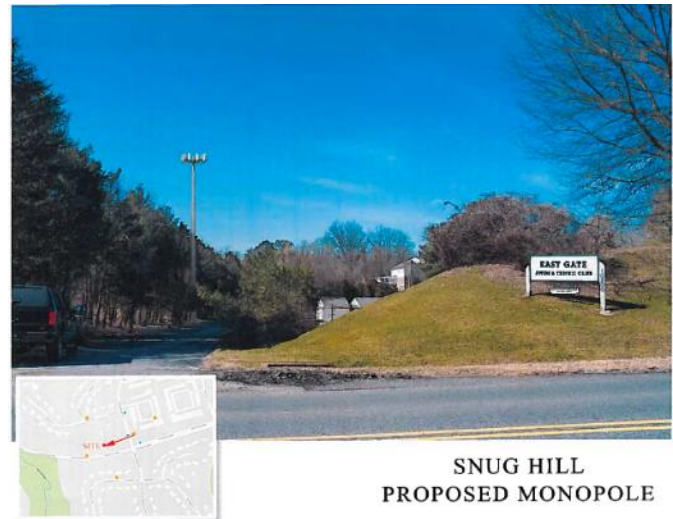
Revised – parking lot



View# 5 – Gainsborough Road



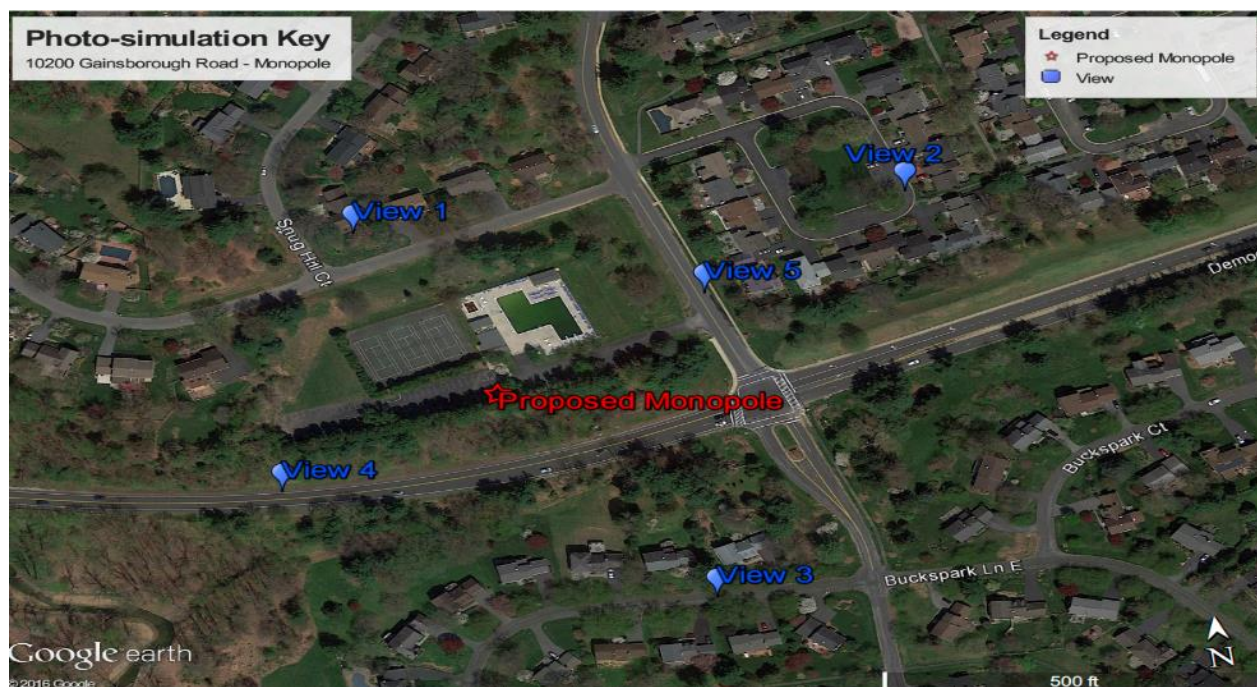
SNUG HILL
PROPOSED MONOPOLE



SNUG HILL
PROPOSED MONOPOLE

Staff issued an Addendum to the Staff Report on December 30, 2016, to address the revised photo-simulations. Exhibit 84(a). Staff found that the new simulations demonstrated that the tower was “significantly more visible from off-site views.” *Id.* at 3. Staff also reviewed the administrative modification (S-596) request and found that “the Project does substantially alter the nature, character, intensity of the recreational facility and the conditions of the original grant because of the height, design, visual obtrusiveness, and lack of screening.” *Id.* at 4. As a result, Staff decided to withhold their initial recommendation pending receipt and review of alternate designs addressing the visual impact of the tower. *Id.* at 5.

New photo simulations were submitted with the amended application. The approximate locations from where the simulated monopine is visible at the proposed site are identified on an aerial photograph of the area (photo-simulation key) by view number. The locations were based on GPS coordinates and not any specific address. The photographs used to simulate the monopine in the swim club parking lot were taken in March 2016. Tr. 161. The photo-simulation key and simulated photographs are shown below and on the following pages (Exhibits 145(h)-(m)):



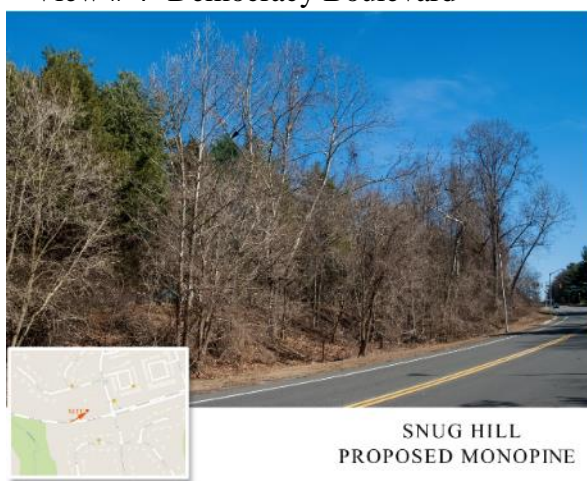
View #1 – Snug Hill Lane

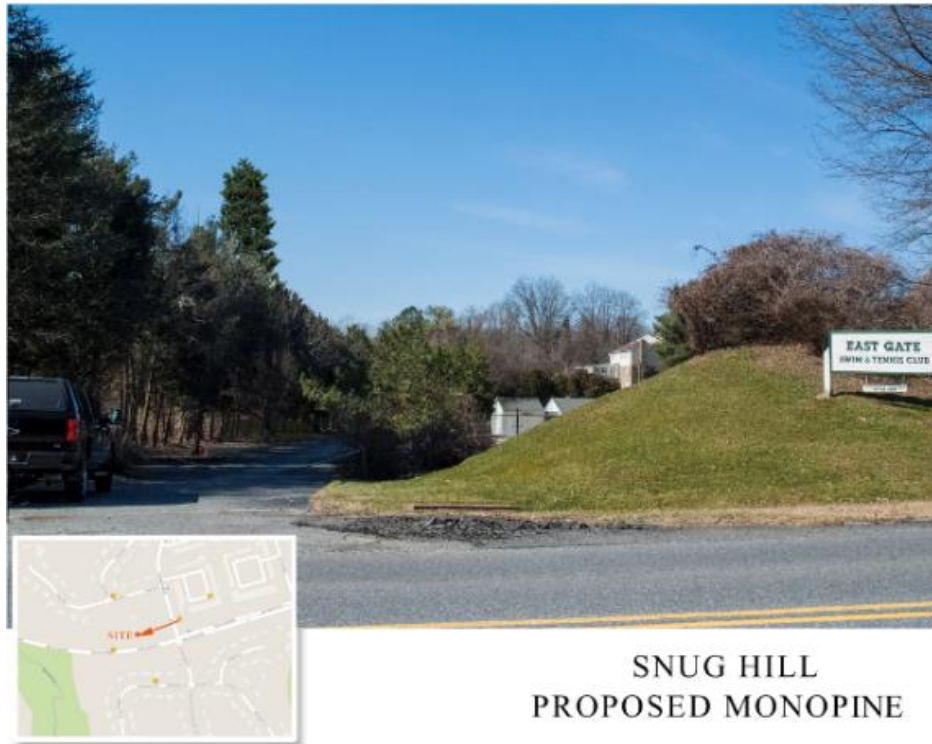
View #2 Gainsborough Rd. (east cul-de-sac)



View #3- Buckspark Lane West

View #4- Democracy Boulevard



View # 5- Gainsborough Road³⁹

Technical Staff made the following comments regarding the visibility of the monopine at the proposed location based on the photo simulations shown above (Exhibit 197(a), pp. 28-29):

As indicated by the application and photo simulations, the support structure is designed as a stealth pine tree to conceal the monopole and antennas. The structure is further mitigated with screening by existing vegetation, trees, and proposed new plantings. Therefore, the visual impact is less than significant.

As requested by Staff, Mr. Savard created photo simulations showing the monopine at the alternate location or pool entrance where the required setbacks could be met for an 80-foot structure. The photographs for the alternate location were taken in August 2017. Exhibit 179(a)-(f); Tr. 148. The photo simulation key and simulated photographs are shown below and on the following pages:

³⁹ The monopine in this view is located in the trees and not the parking lot. Compare this with the original and revised photo simulations of the monopole reproduced on pages 45-46 of the Decision.



View # 1- Snug Hill Lane

View # 2- Gainsborough Rd. at Snug Hill Lane



View # 3- Gainsborough Rd. (south of Democracy Blvd.)

View # 4- Democracy Blvd.



View # 5- Gainsborough Rd.



Technical Staff commented that the monopine at the alternate location “would cause the facility to be more visible from off-site because it would not be screened by the existing landscape and the proposed landscape plantings along the northern property line would be less effective.” Exhibit 197(a), p. 14.

Technical Staff supported Applicants’ setback waiver without considering whether the proposed tower can meet the setback requirements at the alternate location. Instead, Staff provided the following analysis (Exhibit 197(a), p.14):

In order to meet the minimum tower setbacks, the Project would [] need to be located near the center of the parcel adjacent to the swimming pool, as shown in Attachment D [photo-simulations of alternate location]. This would cause the facility to be more visible from off-site because it would not be screened by the existing landscape and the proposed landscape planting along the northern property line would be less effective.

Siting the tower in the proposed location (Attachment C [photo-simulations at proposed location]) is preferable over siting the tower in a location that meets the minimum setbacks because it [is] less impactful, screened by mature landscape, and [it is] farther away from dwellings.

The reduced setback to [28 feet 11 inches] is not less than the required 15 ft. building setback as required for a detached house in the R-200 zone. A reduced setback will allow the facility to be located in a less visually obtrusive location because it would be situated closer to mature trees and landscape, which reduces visibility from nearby homes. The proposed location satisfied the minimum setback required from dwellings of 300 ft.

The site is narrow with steep slopes that most of the residential properties to the west, north and east overlook or have a clear view of the Swim Club. Based on the peculiar topography and the visibility of the site from the surrounding roads and properties, as noted by the Board of Appeals, “the major impact of the facility [swim club] would be the visual intrusion and noise [for] existing homes immediately north of the club site, and the view from the south[.]” Exhibit 76(l).

The monopine will be located in the parking lot of the Swim Club and not within the trees as described by Staff. The photo simulation showing the view from Snug Hill Lane clearly shows that the monopine is in the parking lot and not within the existing stand of trees between the parking lot and Democracy Boulevard. Exhibit 145(i). This stand of trees, acting as a buffer, was intended to minimize the visual impact of the swim club from Democracy Boulevard and properties to the south. Despite being approximately 20 feet taller than the existing trees, the buffer appears to provide some screening of the monopine from Democracy Boulevard. However, because the buffer is a mix of deciduous and evergreen trees, the monopine will likely be more visible from the south when the trees drop their leaves in the winter.

The photo simulations showing the view of the monopine from Snug Hill Lane (identified as view #1) at the proposed location (Exhibit 145(i)) and alternate location (Exhibit 178(b)) are very similar. Because both locations are roughly at the same elevation, the visual height and bulk of the monopine does not change if moved from the pool entrance to the parking spaces across from the tennis courts. The only visible difference is that the pine trees along the tennis court

appear to screen the equipment compound at the proposed location. Otherwise, most if not all of the monopine is in full view from properties to the west, north and east. The buffers along Snug Hill Lane and Gainsborough Road were created in order to minimize the visual intrusion of the Swim Club. Disguising the tower to look like a pine tree, however, does little to minimize the significant bulk and height of the proposed monopine from the surrounding neighborhood given the site's peculiar topography and "bowl appearance". Exhibit 76(l); Tr. 55.

In addition, the photo simulation of the view from Gainsborough Road (identified at view #5) incorrectly places the monopine within the stand of trees and not in the parking lot as proposed. Exhibit 145(f). The original photographs of the monopole were revised for this same reason. This mistake caused Staff to withhold its recommendation because the monopole in the parking lot as proposed was significantly more visible from off-site views. Exhibit 197(a), p. 3. Thus, Staff's conclusion that the monopine is less visually obtrusive in the parking lot is based on an inaccurate photo simulation.

In view of the foregoing, the Hearing Examiner finds that there is insufficient evidence to support Staff's conclusion that the monopine would be less visually obtrusive at the proposed location than at the pool entrance.

2. Property Values

One of the concerns expressed by the neighbors is that the proposed tower may diminish their property values. Both sides produced expert testimony on the question of whether cell towers (and similar structure), in general, adversely impact property values of nearby residential properties.

Applicants presented the expert testimony and a July 13, 2016, report of Robert Steere, a real estate market analyst. Exhibit 180(f)(ii); Tr. 315-342. As a market analyst, he does not appraise

properties but studies real estate trends in a community to determine if there are factors or other externalities that impact value. In this case, he was hired to conduct a market study for the Potomac area. He visited the site and the surrounding neighborhood. Tr. 318. Mr. Steere testified that when he conducted his study it was for a monopole and not a tree pole. However, based on the photo simulations and site visit he believes the proposed monopine will blend in more with the existing trees as a backdrop, which he believes will soften the view of the monopine from properties to the north and west along Snug Hill Lane. In his opinion, the proposed tower will have no adverse effects on the surrounding neighborhood. Tr. 327, 331.

Mr. Steere reached the same conclusion based on his review of public records and sales data for homes adjacent to a cell tower (Kentsdale Estates) and public utility right-of-way (Potomac Crest). Kentsdale Estates is approximately 1½ miles northwest of the site and adjacent to the Bullis School, which has a 140-foot cell tower in close proximity to the neighborhood. The Potomac Crest neighborhood is approximately 1 mile northeast of the site and backs up to the Pepco Row utility right-of-way. Based on a review of the sales records and data for both neighborhoods, Mr. Steere testified that “there hasn’t been any particular adverse effect on the values of homes based on their proximity to cell towers or even other types of utilities of this nature. Likewise, the proposed facility is quiet and static. It’s just like another tree [on the property].” Tr. 326.

The Opposition presented the expert testimony of Terrance McPherson, a Maryland Certified General Real Estate Appraiser. Tr. 362-424. In his professional opinion, the proposed monopine can result in a diminution of value of some confronting properties. Mr. McPherson conducted a diminution-in-value market study of the Potomac area. This included a group analysis of homes in Potomac Crest, interviews with stakeholders in the neighborhood and a paired analysis

of home sales in East Gate before and after the sign announcing the conditional use application was placed on the swim club property.

The group analysis consisted of comparing sales data of homes in the Potomac Crest neighborhood based on location and exposure to the transmission towers which also included co-located cell antennas. He created a sales data comparison chart (Exhibit 191(h)) indicating that homes that adjoin the Pepco right-of-way (exposed to transmission towers) sold for about 11¼% to 11½ % less than homes that are not adjoining. Since sales are based on a lump sum, he determined that the price per square foot of the lump sum is less than 5 percent which reflects a diminution in value. However, because cell antennas were co-located on the transmission towers he could distinguish between the transmission tower or cell antennas in terms of the impact on the home sales. Tr. 376-377.

Mr. McPherson called listing and sales agents with properties in close proximity to the swim club and asked a series of questions regarding the impact of the announcement of the proposed tower. The agent for 8201 Snug Hill Lane reported the listing expired. It was originally listed for \$1,240,000. She reported that if the property is listed after construction of the cell tower, the owner can expect a price of less than a million. She indicated that buyers will bring an electromagnetic device to the property and if they detect an electronic field, they will either walk away or seek a discount on the price. A property on Gainsborough Road was listed after the announcement for \$895,000. The agent reported the price has been lowered twice and is down to \$815,000, but she expects the price to drop into the 700s. Based on this feedback, Mr. McPherson determined the announcement of the proposed cell tower probably resulted in a diminution in value. Tr. 382.

Mr. McPherson did a paired analysis of home sales in the East Gate community before and after announcement of the proposed tower. Tr. 383. He identified two properties that sold prior to the announcement: 8320 Snug Hill Lane, which sold for \$1,200,000, and 10204 Democracy Lane, which sold for \$925,000. He paired these properties with property located at 8307 Snug Hill Lane which was originally listed for \$1,200,000 and sold in July 2017 for \$1,038,000. According to the real estate agent for the property, the original listing was withdrawn but later relisted. Based on this information, Mr. McPherson determined that there was a 10% diminution in value. Mr. McPherson testified that market is based on perception and in his opinion the swim club property is a contributory value within the subdivision, which if impaired may impact the value of the homes that use it. Tr. 415-416.

The Opposition also presented the testimony of Ronald Danielian, a real estate agent licensed in Maryland, Virginia and Washington D.C. who was qualified as an expert in economic value of properties. Tr. 424-464. What a property sells for is the economic value. In Mr. Danielian's professional opinion, the proposed use will have an adverse impact on the nearby properties, especially on those properties with a view of the tower. He noted that the tower will be more visible during the peak selling months from January to March because the leaves will have fallen off the existing trees. Tr. 449. However, he agreed that every house will sell for a price, and he has no knowledge of a buyer who did not buy a property because of the presence of a monopine. Tr. 458.

The issue here is not whether cell towers in general may have adverse effects. The issue is whether any non-inherent characteristics of the particular proposed cell tower on this site would have undue adverse effects on the values of the homes exposed to the proposed cell tower. The Hearing Examiner finds that the aforementioned testimony by the expert witnesses from both

parties is unpersuasive, as none of the testimony was directly on point. While the expert witnesses provided for the possibility that the proposed cell tower may impact property values, because there are no tree-pole facilities within the Potomac area with which to compare the proposed tower, the Hearing Examiner finds that there is insufficient evidence that this type of tower at this location would actually reduce property values.

E. The Master Plan

The East Gate property is located within the boundaries of the 2002 Potomac Subregion Master Plan (“Plan”). Technical Staff noted that “[t]he site is in the easternmost portion of the Master Plan and it is the most densely developed area of the planning area.” Exhibit 197(a), p. 13. The Plan does not contain any specific recommendations for this property. The Master Plan focuses on respect for the environment but recognizes the need to build communities and resources that will serve existing and future generations of residents. (Plan, p. 1). While telecommunication towers are a permitted use as a conditional use in the R-200 Zone, the Master Plan provides the following recommendations and guidelines for reviewing conditional uses, including telecommunication facilities, in a residential zone (Plan, Special Exception Policy, pp. 35-36):

This Plan endorses guidelines for locating special exception uses in residential areas and recommends a re-examination of the approval process for telecommunication facilities, *particularly monopoles*. ... A special exception may be denied if the concentration of such uses is deemed to be excessive *or* if it is inconsistent with Master Plan recommendations. The Master Plan seeks to provide guidelines that will protect residential areas while also attempting meet important policy goals. (Emphasis added)

Recommendations:

- *Limit impact of existing special exception in established neighborhoods.*
- *Increase the scrutiny in reviewing special exception applications for highly visible sites and properties adjacent to the Chesapeake & Ohio Canal National Historic Park.*

- *Avoid an excessive concentration of special exceptions along major transportation corridors.*
- *Protect the Chesapeake & Ohio Canal National Historic Park, major transportation corridors, and residential communities from incompatible design or special exception uses.*

In the design and review of special exception uses, the following guidelines should be followed in addition to those stated for special exception uses in the Zoning Ordinance:

- a. Adhere to Zoning Ordinance requirements to examine compatibility with the architecture of the adjoining neighborhood...
- b. Parking should be located and landscaped to minimize commercial appearance.
- c. Efforts should be made to enhance or augment screening and buffering as viewed from abutting residential areas and major roadways.

Technical Staff found that the proposed use on a non-residential property operating under a special exception as a private recreational club substantially complies with the above stated Master Plan recommendations and guidelines for reviewing conditional uses. Staff found the nature of the proposed use will not conflict with or impact the operation of the Swim Club. In Staff's opinion, the proposed use will not result in an overconcentration of special exceptions in the neighborhood. Further, Staff found that the visibility of the proposed tower from off-site views will be "less than significant" and therefore will be compatible with the surrounding residential neighborhood. Staff noted that in addition to the towers stealth design as a pine tree and location "within an area of mature trees", its view will be further screened by the additional landscaping proposed along the northern slope. Exhibit 197(a). pp.13-15.

The Master Plan recommends increased scrutiny for visible sites to protect the compatibility of conditional uses in established neighborhoods. The Hearing Examiner agrees that telecommunication towers are a permitted conditional use in the R-200 Zone, and as proposed, the tower here will not result in an excessive concentration of conditional uses in the neighborhood.

However, the Hearing Examiner disagrees with Staff and finds that the proposed tower at the proposed location is not compatible with the surrounding residential neighborhood.

The Hearing Examiner disagrees with Staff's conclusions that the visual impact of the proposed structure from off-site views is or will be adequately screened by its stealth design as a pine tree, location, and additional landscaping along the northern slope. The site is too narrow to comply with the required setbacks, which increases the visual impact of the monopine on the adjoining properties. The existing buffers to the west, north and east were intended to minimize the visual impact of the recreational facility from nearby roads and residential properties which surround the site. The buffer to the south along Democracy Boulevard will screen the top of the monopine. Also, the screening of the rest of the monopine will be less effective in the winter when the deciduous trees lose their leaves.

Given the site's central location within the residential cluster subdivision and "bowl appearance" caused by the steep slopes to the west, north and east, disguising the tower to look like a pine tree does little to minimize the significant bulk and height of the proposed monopine. Thus, the Hearing Examiner finds that an 89-foot tower camouflaged as a pine tree in the parking lot of the swim club is not compatible or harmonious with the residential neighborhood surrounding the site.

Based on the record, and for the reasons stated herein, the Hearing Examiner disagrees with Staff and finds that the proposed use at this location is inconsistent with the recommendations and goals of the Potomac Subregion Master Plan.

F. Need for the Proposed Facility

Section 59.3.5.2.C.2.b.xii of the Zoning Ordinance provides:

The Hearing Examiner must make a separate finding as to need and location of the facility. The Applicant must submit evidence sufficient to demonstrate the need for the proposed facility.

Applicants are proposing to locate a new telecommunications tower on the swim club property in order to fulfill its service requirements for the area. The Tower Committee reviewed the original application on June 22, 2016, and in a Notice of Action dated June 29, 2016, recommended approval of the original application conditioned on approval of a conditional use for the placement of the monopole on the property. The Tower Committee determined the Applicants have a justified need for a new 80-foot tall monopole (extending to 83-feet tall with antennas). The committee also found there are not any existing structures in the vicinity that would meet Verizon's service need for the area. Exhibit 5(b). The Tower Committee did not review the amended application because the proposed changes were for additional screening and camouflage of the monopole so it would look like a pine tree. Exhibit 99(a).⁴⁰

Applicants presented evidence at the hearing as to both the need for and proper location of the proposed telecommunications facility. Specifically, Applicants presented the expert testimony of Paul Dugan, a Radio Frequency (RF) engineer (Tr. 271-314), and Robert Posilkin, site acquisition consultant to Verizon. Tr. 257-271.

Mr. Posilkin, an expert in telecommunications site acquisition, testified as to the site selection process. Verizon provided their identified RF objectives and need to improve service

⁴⁰ The Opposition argued that the June 29, 2016, TFCG recommendation did not comply with Section 59.3.5.2.C.2.b.i of the Zoning Ordinance because it was more than 90 days old. However, based on the legislative history of ZTA 10-05, the intent of this requirement is that the TFCG recommendation be no more than 90 days old at the time the conditional use application is filed. The recommendation was dated June 29, 2016. It was submitted with the conditional use application filed with the OZAH on September 23, 2016. Exhibit 5(a). The Chair of the Tower Committee agreed with Staff that the amended application did not need to be resubmitted to the tower committee for review. Exhibit 99(a). Since the Zoning Ordinance permits conditional use applications to be amended and the Chair of the Tower Committee determined the proposed modifications did not require a second review, the Hearing Examiner ruled that the TFCG recommendation dated June 29, 2016, was timely filed. Tr. 38-43.

coverage west of Seven Locks Road along Democracy Boulevard and Gainsborough Road. Verizon provided Mr. Posilkin with a specific search area circled on a map. Mr. Posilkin advised that the preference is to find an existing structure (*i.e.*, monopole, roof, transmission tower) on which to collocate antennas before selecting a site to install a new facility. Based on his search of the target area, he identified the Swim Club property, the MNCPPC tennis center and the Westlake Towers as possible sites. Verizon rejected the tennis center and Westlake Tower sites because these sites would not meet their RF objectives due to their location at the edge of or outside the search ring. Verizon selected the Swim Club property because the location would meet the RF objectives and provide better coverage within the target area. Tr. 265.

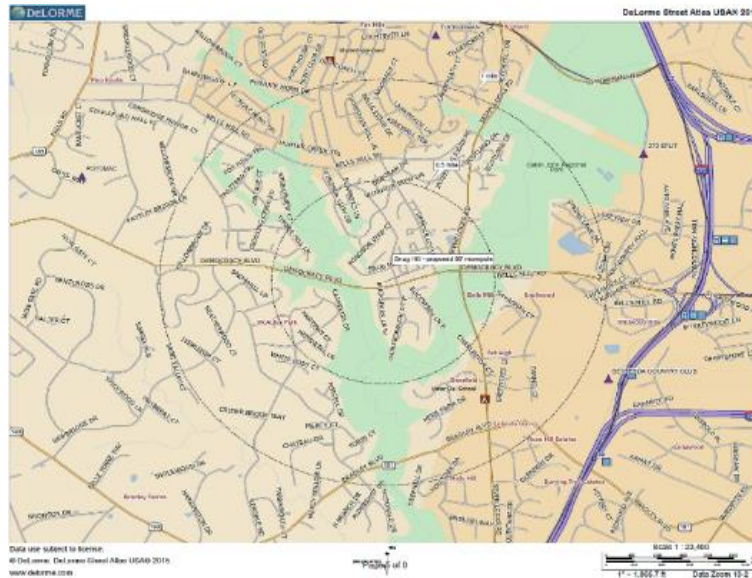
Mr. Dugan was hired to provide an independent evaluation and opinion as to whether the Swim Club location and height of the proposed tower are needed to meet Verizon's RF objectives. In a report dated October 21, 2016, Mr. Dugan describes Verizon's RF objectives and how these objectives are met at the proposed location as follows (Exhibit 180(e)(i)):

The objectives of the proposed communications facility are first to provide new reliable 4G LTE coverage to a section of Potomac Maryland centered at the junction of Democracy Boulevard and Gainsborough Road and extending approximately 0.75 miles in all directions from the proposed facility location. This area includes sections of Democracy Boulevard, Gainsborough Road, Seven Locks Road, and the adjoining roads in the surrounding residential communities. The proposed facility will provide improved in-building coverage to the residential communities in the vicinity.

Additionally, the site will offload wireless traffic from adjacent facilities (*i.e.* provide capacity relief), more specifically, those identified on the propagation exhibits as Potomac, Tuckerman, 270 Split, and Bethesda Country Club. Therefore, the proposed facility will provide both coverage and capacity improvements to the area which the facility will serve. The proposed facility will improve service and provide better handoff between the existing adjacent sites.

Mr. Dugan visited the site and adjacent existing Verizon wireless facilities which he identified on a DeLorme Street Atlas map. The two concentric circles represent the distances from

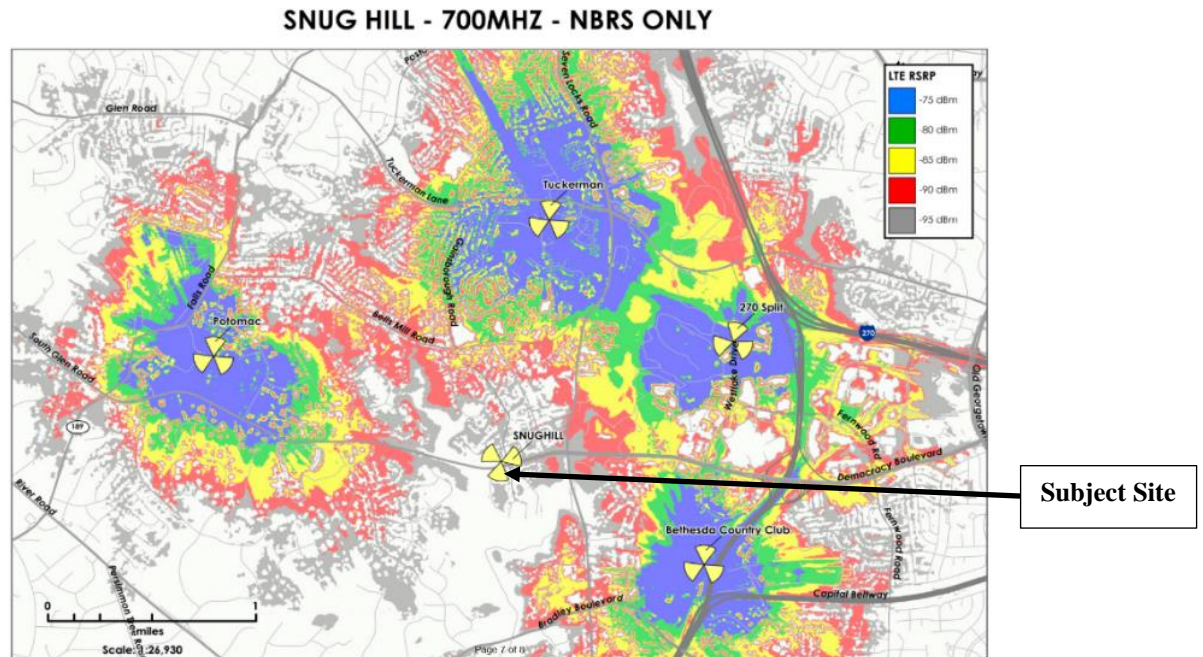
the site: the small circle is ½ mile and the larger circle is 1 mile. The map is shown below (Exhibit 180(e)(i), p. 5):



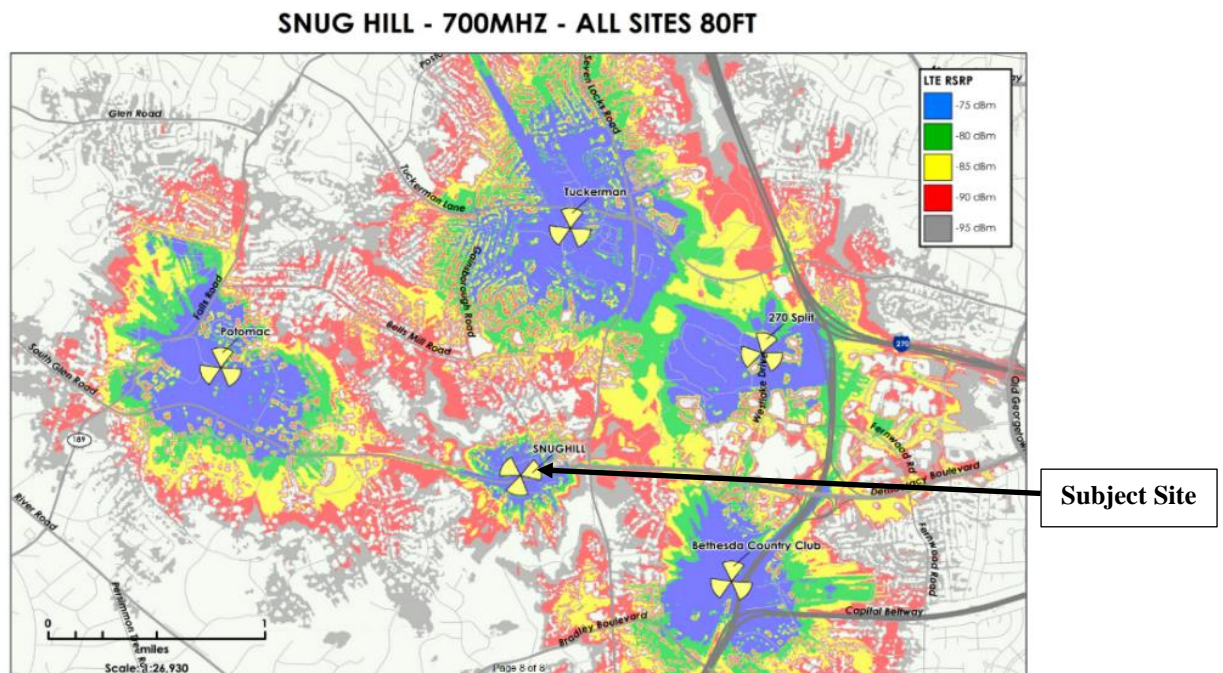
The existing Verizon wireless facilities are identified by site name and purple triangle and are described as follows: “Potomac” is a 130’ monopole located at 10601 Falls Road; “Tuckerman” is a 146’ utility pole located at 11404 Gainsborough Road; “270 Split” is a 123’ Pepco utility pole at Westlake Drive; and “Bethesda Country Club” is a 150’ monopole located at 7601 Bradley Boulevard. During his search of this area, Mr. Dugan was unable to identify an existing structure for collocation. Tr. 280-282.

Mr. Dugan identified propagation exhibits (coverage maps) showing the existing level of service around the swim club property (Exhibit 180(e)(ii)(a)) and based on the height of the proposed tower at 80’ (Exhibit 180(e)(ii)(b)). He explained the colors on the maps represent the different thresholds of signal strength in the area. The lower the decibel (dBm) number, the stronger the signal (-75 dBm is blue). A higher signal strength provides better in-building coverage and greater data throughput speeds needed to support the current 4G LTE technology. Verizon strives for a minimum of -95 dBm in all areas (grey). Tr.284-285.

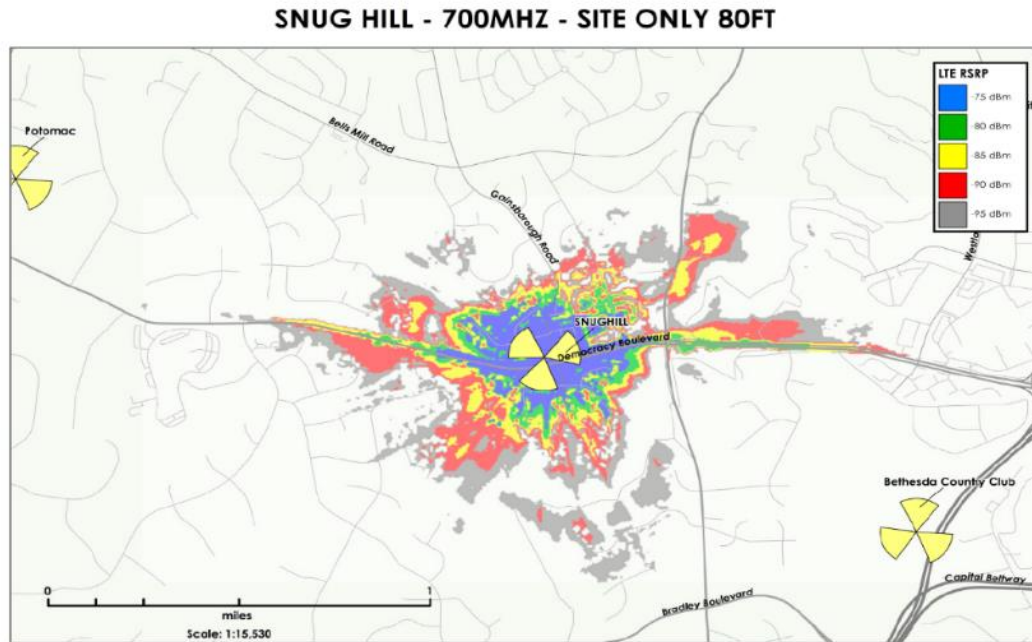
The existing service level of service around the Swim Club property without the proposed tower is shown below (Exhibit 180(e)(ii)(a)):



The proposed coverage of service for the target area with the proposed 80-foot tower at the Swim Club property is shown below (Exhibit 180(e)(ii)(b)):



The proposed coverage of service for the site only with an 80-foot tall tower is shown below (Exhibit 6(g)):



Mr. Dugan confirmed that the coverage maps were created by Verizon RF engineers and he was hired to conduct his own tests to verify the signal levels as shown on the coverage maps. On cross-examination, he indicated that he is not given the modelling information used to create the maps. He acknowledged that while coverage maps could be manipulated, he does not believe these maps were because the results of the tests he conducted were consistent with the maps. Tr. 294-295.

He also used drive test methods using his smartphone to determine the signal strength and data throughput speeds in the target area. Test calls revealed that the signal strength from every intersection and cu-de-sac in the neighborhood surrounding the site was insufficient (weak) to support the current 4G LTE technology. He said most of the test calls dropped out of 4 G to 2 G or 3 G, some with delays and poor call quality. Using a data speed test application, he determined that the “data throughput speeds in the entire community to the north into the south it’s at or below

1 Mb per second everywhere.” Mr. Dugan said reliable throughput data speeds are “25 Mb to 50 Mb per second, which can support live, real-time streaming video.” Tr. 286.

Mr. Dugan summarized his opinion that his tests results are consistent with the coverage maps as follows (Exhibit 180(e)(i), p. 2):

It is clear from the propagation exhibits that there is a significant gap in coverage in this community. The center of the target search area for this facility is the junction of Democracy Boulevard and Gainsborough Road. The areas in white contain insufficient signal levels to serve the subscribers reliably in this area. This does not imply a total lack of any kind of service in the white areas from the propagation exhibits, but weak signal levels in the area equates to little in-building coverage and inadequate data throughput speeds. Again, the white areas do not reflect a total lack of any service, but rather varying levels of unreliable service. I [] validated the lack of sufficient coverage during my site visit.

As shown on the coverage map (Exhibit 180(e)(ii)(b), Mr. Dugan testified that the new tower at the Swim Club will provide improved and reliable service approximately three quarters of mile in all directions from the site. He clarified that dropping the centerline of the antennas from 80-feet, as proposed in the original application, to 76-feet as proposed in the amended application “would not have any consequential significance in the coverage footprint.” Tr. 288-289.

Mr. Dugan conducted a site visit and drove through the surrounding neighborhood to evaluate the topography, existing trees, foliage and vegetation on the site which impact the height of the tower necessary to provide effective coverage. He explained that the antennas need to be sufficiently above the height of the existing trees in order to have a clear signal to provide effective coverage. Trees absorb energy and will reduce or inhibit the radiofrequency signal, which will reduce the service coverage area. Tr. 308.

In this case, Mr. Dugan noted the site is at a lower elevation than the surrounding neighborhood. Verizon’s antennas centered at 76 feet are above the existing tree line estimated to be between 60 and 70 feet tall. As a result, the trees will not interfere with the antennas signal.

However, future carriers with antennas centered at 66' and 56' on the support structure will be at a disadvantage because the trees will reduce the range of coverage of the service area. Tr. 306-307. With regard to the faux branches, he believes the support structure will be designed so that the faux branches will not interfere with the antennas for co-locators. The primary concern will be interference from the existing trees. Tr. 308-309.

In Mr. Dugan's expert opinion, the proposed tower at 80-feet tall is necessary to provide effective coverage to the intended service area in order for Verizon to achieve its RF objectives. This is the shortest tower Verizon can build at this site because of the topography, height of the existing trees and dense vegetation and foliage on the site and in the neighborhood. As a result, he stated there are no feasible alternatives like small cell or microcell antennas on light or wooden poles for this location. Tr. 289-290, 295-297.

The Tower Coordinator's recommendation provided a similar analysis of the area and need for an 80-foot tower at the site. The topography surrounding the property and the need for an 80-foot tall tower are described as follows (Exhibit 5(b), p. 2):

The Buck Branch stream west of the Swim Club and Cabin John Creek to the east and south of the property create a valley where the terrain is lower than the larger surrounding area; this valley can limit the antennas at the proposed elevation above ground from serving a larger coverage area than a quarter to half mile radius from the property. An excerpt from the USGA topology map of the vicinity around the Swim Club is provided below for reference. The location of the Swim Club is circled.



The applicant provided maps illustrating Verizon Wireless signals covering the vicinity of the Swim Club with and without the antennas as proposed and at 20' lower. The map illustrating existing coverage shows that signal strength in this vicinity is less than the target levels of approximately -90 dBm. The map illustrating coverage with the new monopole and antennas shows that signal levels at the target level may be attained with antennas at the proposed height of 80' above ground level for approximately a quarter mile to half mile around the Swim Club (as terrain suggests may be the case). The maps indicate that antennas below 80' level significantly reduce the size of the area served at the target signal levels. Thus, the need for antennas at the height proposed is supported by the documentation provided with the application.

The Tower Coordinator noted that “[b]ased on our review of the TFCG database and supplemental information provided by the applicant, there are no other existing structures in the vicinity to which Verizon Wireless could attach their antennas and service the target coverage area.” *Id.*

The FCC regulates radio frequency exposure issues on a Federal level. Local jurisdictions are prohibited from deciding that a proposed facility is inappropriate based on health concerns regarding RF exposure as long it complies with FCC regulations. Section 704(b) of the Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides, *inter alia*, that

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC’s] regulations concerning such emissions.

Mr. Dugan testified and submitted a separate report dated October 25, 2016, certifying that the proposed facility will comply with FCC standards for RF emissions (Exhibit 180(e)(iii)); Tr. 290-293). In his report, Mr. Dugan stated (*Id.*, p. 2):

[T]he exposure at ground level at any distance from the structure would be substantially below the 1 % of the FCC exposure limits due to Verizon Wireless antennas alone. The extremely low ground exposure levels are due to the elevated positions of the antennas on the structure and the low power which these systems operate.

Mr. Dugan certified that Verizon will comply with electromagnetic field safety standards (well below 1 %) and will take appropriate measures to ensure the proposed facility will “comply with applicable exposure limits and guidelines adopted by the FCC governing human exposure to radiofrequency electromagnetic fields (FCC Bulletin OET 65).” *Id.*, p. 3.

The Opposition presented the testimony of Mr. Lawrence Monroe. He was qualified as an expert on the permitting of towers and wireless facilities. Mr. Monroe reviews applications for wireless facilities for completeness. In his opinion, the application was incomplete because the modelling information used to create the coverage maps was not provided. This information is needed to verify the accuracy of the maps which he said may be based on incorrect information or intentionally manipulated to show a need that may not exist. He believes that the maps were scaled too small “to have any meaningful analytical value and they show the situation only in the most general terms.” Tr. 498. While the Hearing Examiner found Mr. Monroe’s testimony to be informative about the application review process, his testimony did not provide any support or evidence to contradict Mr. Dugan’s expert opinion that there is a need for a new facility to improve cell coverage in the neighborhood west of Seven Locks and along Democracy Boulevard and Gainsborough Road.

Therefore, based on Mr. Dugan’s testimony and the recommendation of the Tower Committee as it relates to need only, the Hearing Examiner finds that there is a need for a new telecommunications facility in this region. However, despite a demonstrated need for improved coverage in this area, the Hearing Examiner finds that the East Gate Swim Club property is not the appropriate location for a new cell tower. Mr. Dugan and the Tower Committee agreed that the minimum height of the tower to achieve Verizon’s RF objectives at this location is 80 feet. As previously discussed in Part II.5, of the Decision, the site is too narrow to comply with the setback

requirements. Thus, the support structure cannot be taller. A shorter structure which may meet the setbacks is not feasible because the topography and existing trees at 60 to 70 feet will interfere with the antennas and reduce the range of coverage for the intended service area. As a result, the site constraints realistically limit or possibly eliminate co-location opportunities, turning the proposed structure into a single cell tower.⁴¹

Based on the evidence of record and for the reasons previously stated, the Hearing Examiner finds that the East Gate Swim Club property is not the appropriate location for the proposed tower.

G. Community Response

The community is overwhelmingly opposed the proposed application. The OZAH received numerous letters of opposition, and a petition in opposition was filed. Exhibits 35-36,38,39,40-50, 54-60, 64, 66-67, 77(a), 81, 87(a), 100, 156-158, 161,167, 169, 171, 173-178, 183-184, 196, 232, 243-245. In addition to challenging the validity of the Lease and East Gates compliance with its by-laws, individuals expressed some of the following concerns:⁴² The health and safety of its members from exposure to the Radiofrequency (RF) Emissions of the tower; the height and presence of the tower is inconsistent with the recreational use and purpose of the property; visual impact alters the residential character of the neighborhood; compatibility; impacts on property values and environmental concerns; safety issues related to the battery and generator back-up (i.e., leakage of batteries and noise from generator); increase in traffic and noise associated with maintenance of the tower and possible expansion; the location of the tower impairs possibility of

⁴¹ Mr. Siverling confirmed that “the county wants people to co-locate [because they] don’t want . . . towers popping up everywhere for . . . a single carrier.” Tr. 201.

⁴² This is a brief summary and not an exact list of the many concerns raised in the letters of opposition.

second access off Democracy Boulevard; lack of need for the facility; and loss of pool membership due to perceived health risks of tower.

The OZAH also received three letters of support for the application stating that the use will provide a stable revenue needed to maintain the swim club, a valuable recreational facility for the community. The main concern expressed was maintaining the viability of the swim club. The supporters were concerned that the perceived health risks and potential impact to property values may have been overstated or based on misinformation. Exhibits 58, 92 and 97.

Approximately 19 individuals testified in opposition in two hearings raising many of the same concerns raised in the letters of opposition. Many provided additional photographs and other documents during their testimony. Exhibits 206-228, 233-235. No members of the neighborhood testified in support of the application.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested; in this case, a Telecommunications Tower Conditional Use allowed under *Zoning Ordinance* Section 59.3.5.2.C.2.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application does not conform to the general or specific standards for approval. Thus, the Hearing Examiner denies the application.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:

E. Necessary Findings***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:******a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended***

Conclusion: The property is already subject to an existing special exception (S-596) for a community swimming pool and tennis club. East Gate filed a request for an administrative modification of its special exception to allow the proposed conditional use on the property and to modify the existing parking lot. Case No. S-596, Exhibit 38(a). By Resolution dated October 10, 2016, the Board referred the administrative modification request to the OZAH "for consideration with Conditional Use Case No. [CU-T-17-01], and for the issuance of a report and recommendation on the requested modification." The Board found "that the effect of the proposed telecommunications tower and related equipment cabinet on the immediate neighborhood will be addressed in the context of the pending conditional use proceedings. Accordingly, the Board finds that the effect of these proposed additions on the swim club property and the immediate neighborhood cannot be known with certainty prior to the conclusion of the conditional use proceedings." Case No. S-596 Exhibit 38(b), p. 2.

For the reasons discussed in this Decision, the Hearing Examiner finds that the conditional use application does not meet the Zoning Ordinance requirements for approval of a conditional

use for a telecommunications tower on the subject property and denies the application. Therefore, the request for an administrative modification is moot.

The Opposition argues that the application does not conform to the prior subdivision approval for the Swim Club. They assert that the subdivision restricted the use of the property exclusively to a recreational use. Staff did not address the issue. The Opposition relies on several factors underlying approval of the preliminary plan to support its argument: 1) The site is identified on the preliminary plan as a “proposed recreational association” and includes the note: “All lots to meet or exceed the cluster provisions of the R-R Zone & R-90 Zone”; 2) The plat states that development of the land is “only permitted in accordance with the land use shown on the approved development plan.”; and 3) A letter addressed to the Planning Department prior to the subdivision approval states: “Land will be set aside for a community activities club since those facilities will be provided by private capital, pressure is reduced on public funds for such improvements.”⁴³ Exhibit 231.

The exclusive restricted use is further supported, the Opposition argues, by language from the Planning Board Report implementing the original special exception for the Swim Club. That report states: “It is a documented fact that the site in question has been delineated on the preliminary plan of subdivision as well as on the record plat...as future recreation area to be conveyed to the East Gate Recreation Association, Inc. It is also recognized that such areas in cluster subdivisions generally are developed as community swimming pools.” Exhibit 76(k).

⁴³ In its memorandum, the Opposition cites several cases relating to restrictions of property imposed by condition of subdivision approval. *Annapolis v Waterman*, 357 Md. 484, 745 A.2d 1000 (2000); *Stansbury v Jones*, 372 Md. 172, 812 A.2d 312 (2002). The Hearing Examiner agrees with the Applicants that they are mostly inapposite to the question presented here. The cases recognize generally that the use of property may be restricted by a subdivision approval to a recreational use but do not decide the issue on whether this was in fact the intent in this case.

In further support, the Opposition's land planner, Mr. Joe Davis, testified that "the plat required a swim club and the document states that the land is to be conveyed to East Gate Recreational Association...on the plat it says to be conveyed to that group, but on the approved cluster plan it's shown as a proposed recreation association." Tr. 563-564. The Opposition also argues that the intent was to restrict the use of the land since the special exception for the swim club was implemented after the subdivision approval. Exhibit 248, pp. 8-9.

The Applicants reply by arguing that notes on preliminary plan approval and record plats refer only to ownership; they do not explicitly restrict the *use* of the property. They contend that the Homeowner's Association covenants could have restricted Parcel C exclusively to recreational use, but they do not. They assert that compliance with the subdivision approval is a matter subject to the lawsuit in the Circuit Court, depriving the Hearing Examiner of jurisdiction over the issue.

The Hearing Examiner agrees with the Opposition that the subdivision approval *is* a prior approval to which this application must conform. Zoning and subdivision regulate different aspects of land development. Generally, subdivision regulates public health/safety issues and whether the development is part of the larger plan for systematic development of land within the jurisdiction. Thus, conditions on subdivision approval may include conditions different from those placed on zoning approvals, such as conditional uses. Were an applicant for a zoning approval able to avoid conditions placed on the subdivision, it would negate those conditions, *See* Section 50.10.6 of the *Montgomery County Subdivision Regulations*, and would lead to the absurd result that these regulations could be ignored in subsequent approvals. *C&B Dashiell, et al.*, 234 Md. App 424, 172 A.3d 960 (2017).

That conclusion, however, does not resolve the question of whether an exclusive restriction to recreational use was intended here. On balance, the Hearing Examiner must find that such was

the intent. The preliminary plan notes explicitly restrict ownership. However, contemporaneous documents (*i.e.*, the letter to the Planning Department and the special exception implementing the subdivision approval) weigh heavily in favor of interpreting the provision as an exclusive restriction to recreational use. The letter to the Planning Board clearly attempts to persuade the Board to approve the subdivision based in part on the fact that recreational facilities would be provided at no cost to the County. While that does not deal with the exclusivity of the use, the plat specifically states that uses would be permitted only in accordance with the land use shown on the approved development plan. Based on the subdivision history, the intended use was a recreational facility.

Even more persuasive, however, is the contemporaneous special exception filed to implement the subdivision approval. The Staff Report states: “It is a documented fact that the site in question has been delineated on the preliminary plan of subdivision as well as on the record plat...as future recreation area to be conveyed to the East Gate Recreation Association, Inc. It is also recognized that such areas in cluster subdivisions generally are developed as community swimming pools.” Exhibit 248(b), p. 10. It is clear from this extrinsic evidence that the intended *use* was a recreational facility, although only the future ownership was shown on the plat. Given the plat note that uses were restricted to those shown on the plat, the Hearing Examiner can only find that the subdivision restricted the use solely to a recreational facility.

The Hearing Examiner does not find persuasive the Applicants’ argument that the failure to restrict the land in the Declaration of Covenants for the Homeowner’s Association means that the recreational use was not intended to be exclusive. First, the argument is speculative whether they would or would not have so restricted the property. The primary purpose of the Homeowner’s Association covenants is to subject the residential lots to a homeowner’s association (mandating

payment of association assessments and restrictions on residential properties.) None of this would have applied to the subject property. Second, the failure to include a restriction in covenants of any form could just as likely mean that they assumed the use was already restricted under the subdivision approval.

Nor does the Hearing Examiner agree that the subdivision restriction is at issue in the Complaint filed in the Circuit Court. That Count in the Complaint alleges that the special exception approval created an implied covenant running with the land based on a “common scheme” of subdivision, even though the covenant was never recorded. Implied covenants are purely a private matter and are enforceable by the parties benefited. Thus, they have no relation to the regulatory requirement here that the conditional use comply with all prior regulatory approvals.⁴⁴

Finally, the Applicants argue that Staff did not address the subdivision as a prior approval. The Hearing Examiner does not agree with this argument because there is nothing in the record indicating that Staff was asked to opine on this issue. The failure of Staff to address the issue could as well have been an oversight (as was the failure to determine the setback waivers), rather than an interpretation of the Code. In light of the clear and explicit language of the Zoning Ordinance mandating compliance with prior approvals, Staff’s failure in this instance to address the matter has no weight.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6

⁴⁴ The term “regulatory approval” is intended to distinguish requirements (including conditions) imposed through the regulatory process as opposed to restrictions imposed by private covenants or easements.

Conclusion: This subsection requires an analysis of the standards of the R-200 Zone contained in Article 59-4, the use standards for a Telecommunications Tower conditional use contained in Article 59-3, and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). For the reasons set forth in these sections below, the Hearing Examiner finds that the proposed application does not comply with all the use standards for a Telecommunications Tower conditional use contained in Article 59-3.

c. substantially conforms with the recommendations of the applicable master plan

Conclusion: The Swim Club property is located within the boundaries of the 2002 *Potomac Subregion Master Plan*. The most pertinent portions of the Master Plan are set forth in Part II.E of this Decision. For the reasons set forth in Part II.E of this Decision, the Hearing Examiner finds that the visibility of the proposed 89-foot monopine in the parking lot of the Swim Club is too great to be comply with the recommendations and goals of the Plan to limit the impact of incompatible conditional uses in an established residential neighborhood. The site is too narrow to comply with the setback requirements which increases the visual impact of the monopine on the adjoining properties, most of which are at a higher elevation due to the steep slopes on the site. The existing buffers and proposed landscaping are insufficient to reduce the bulk and height of the proposed monopine given the sites topography and close proximity to adjoining properties. Thus, the Hearing Examiner finds that proposed use is not compatible or harmonious with the residential neighborhood surrounding the site.

Based on the record, and for the reasons stated herein, the Hearing Examiner disagrees with Staff and finds that the proposed use at this location is inconsistent with and does not substantially conform with the recommendations and goals of the Potomac Subregion Master Plan.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan

Conclusion: For the reasons stated in the previous section, the Hearing Examiner finds that the proposed use at this location will not be in harmony with the residential character of the neighborhood in a manner consistent with the 2002 *Potomac Subregion Master Plan*.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area

Conclusion: In addition to the existing special exception (S-596) on the property, Technical Staff identified three approved special exceptions within the staff-defined neighborhood. These include a second kitchen in a single-family dwelling, a home occupation and operation of a private school. Technical Staff found that the addition of the proposed conditional use to the neighborhood will not “increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area[.]” Exhibit 197(a), p. 21.

The Hearing Examiner agrees with Staff that four approved conditional uses within the staff defined neighborhood will not adversely affect or alter the predominantly residential nature of the area based on the nature and location of the conditional uses within the neighborhood. Although the addition of the proposed use on the same property as the existing use will increase the number of uses on the property, the proposed cell tower use would be passive in nature (*i.e.*, unmanned and no traffic), and thus would not increase the intensity or scope of the existing special exceptions in the way that this provision seeks to address. Rather, the Hearing Examiner finds that it is the height and visual impact of the proposed conditional use, not its combination with other special exceptions in the area, that will adversely affect the neighborhood. For the reasons stated

in Part II.E, of this Decision, the Hearing Examiner finds that the height and visibility of the proposed use at this location is incompatible with the residential character of the neighborhood. It thus is inconsistent with, and does not substantially conform with, the recommendations and goals of the 2002 *Potomac Subregion Master Plan*.

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

Conclusion: The evidence supports the conclusion that the proposed conditional use would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use.

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision. *Id.* Therefore, the Hearing Examiner must consider whether the available public services and facilities will be adequate to serve the proposed use. The proposed facility will be unmanned and in continuous operation 24 hours a day, seven days per week. The proposed use will not require school, water or sewer services. The only visits to the site will be

for emergency service and regular maintenance and inspection which Applicants report will be four times a year. Applicants submitted a Traffic Exemption Statement which was reviewed under the 2012-2016 Subdivision Staging Policy and approved by Technical Staff. Staff reports (Exhibit 255):

The applicant has proven that the proposed use generates fewer than 30 peak hour trips. Therefore, the Local Area Transportation Review (LATR) test has been satisfied and Planning Staff can make an Adequate Public Facilities (APF) finding for the proposed development. Furthermore, the project generates fewer than 3 trips per day, therefore the project is exempt from the Transportation Policy Area Review (TPAR).

Technical Staff found the proposed use will not impact the on-site vehicle circulation because the facility will be located in parking spaces and not be in the driveway aisle. Having no evidence to the contrary, the Hearing Examiner agrees with Technical Staff and finds that the proposed development will be served by adequate public services and facilities.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. Non-inherent adverse effects are “adverse effects

created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.*

As specified in §59.7.3.1.E.1.g., quoted above, inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use. However, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Nevertheless, the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with inherent adverse effects, creates “undue harm to the neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Telecommunications Tower Conditional Use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the surrounding neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

In analyzing potential adverse effects, Technical Staff considered the size, scale, scope, light, noise, traffic and environmental effects of the proposed use. Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a Telecommunications Tower facility (Exhibit 197(a), p. 22):

- (1) antennas installed on or within a support structure with a significant height;
- (2) an equipment platform and equipment cabinets that may or may not be enclosed within a fence;
- (3) visual impacts associated with the height of the support structure;
- (4) radio frequency emissions;
- (5) vehicle trips for maintenance; and
- (6) noise associated with back-up generators or other mechanical equipment.

In support, Technical Staff states (Exhibit 197(a), p. 22):

The characteristics of the Project are inherent and typically associated with Telecommunications Tower Facilities. The applicant submitted an analysis of the impact of the Project on residential property values of the neighborhood. The analysis was prepared by a qualified real estate appraisal firm. The analysis concluded that the Project is unlikely to have any negative influence on the value of adjacent residential properties. Homes adjoin the site are well-buffered from the Project by landscape and tree cover. Further, the Project must comply with the County Noise Control Ordinance (Chapter 31B of the County Code), and as such would not create excessive noise. And, the Project is designed as a stealth pine tree to conceal the support structure from off-site views. The Project would cause no adverse effect to inherent or non-inherent characteristics, or combination thereof, or in any of the following categories: the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood; traffic, noise, odors, dust, illumination or lack of parking; or the health, safety or welfare of neighboring resident, visitors or employees.

The Hearing Examiner would add battery back-up power source to the list of inherent adverse impacts a telecommunications tower as listed above. The inherent effects of a typical telecommunications tower would generally have only a visual impact on the neighborhood since it will be unmanned, require only occasional service with no impact to traffic. While parking is not required for the use, there is sufficient on-site parking for the existing use (79 parking spaces) to accommodate maintenance vehicles. No lighting is required or proposed. Except during installation of the propose facility, the proposed use will not create any dust. Because the details for the battery back-up and diesel generator were not provided, there was insufficient evidence to determine whether either pose a safety issue (i.e., leakage, fuel spills, diesel odor).

Staff did not identify any non-inherent adverse impacts. The Hearing Examiner, however, finds the site is too narrow to comply with the required setbacks making the tower more visible. The visual intrusion of the proposed tower from off-site views, especially for the properties to the west, north and east which site at a much higher elevation is significant. Given the sites “bowl appearance” and insufficient buffers to the west, north and east, there is no place on the site where the tower can be located to make it less visually obtrusive. The bulk and height of an 89-foot fake pine tree is not compatible with a residential neighborhood, especially one with peculiar topography and close proximity of the properties that surround the site. The Hearing Examiner finds the inability to comply with the setbacks due to the site conditions (*i.e.*, narrowness and topography) to be a non-inherent adverse effect that will cause undue harm to the surrounding neighborhood.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: For the reasons stated in Part II.D of this Decision, the Hearing Examiner finds that proposed use is not compatible with the surrounding neighborhood due to its height and significant visibility from off-site views. The site is too narrow to comply with the required setbacks, which increases the visibility of the proposed tower.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: For the reasons stated in the previous section, the proposed use application does not meet the specific requirements for a conditional use.

4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing

Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.

Conclusion: The proposed subject property is in the R-200 zone and is not surrounded by agricultural or rural residential zoned land. This provision is not applicable since the proposed use is not an agricultural conditional use.

5. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

- a. Filling Station;***
- b. Light Vehicle Sales and Rental (Outdoor);***
- c. Swimming Pool (Community); and***
- d. the following Recreation and Entertainment Facility use: swimming pool, commercial.***

Conclusion: This provision is not applicable since the proposed conditional use is not a listed use.

6. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

- a. Funeral Home; Undertaker;***
- b. Hotel, Motel;***
- c. Shooting Range (Outdoor);***
- d. Drive-Thru***
- e. Landfill, Incinerator, or Transfer Station; and***
- f. a Public Use Helipad, Heliport or a Public Use Helistop.***

Conclusion: This provision is not applicable since the proposed conditional use is not a listed use.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-

200 Zone. Development standards for the R-200 Zone are contained in §59.4.4.7.B. of the Zoning Ordinance. Staff compared the minimum development standards of the R-200 Zone to those provided by the application in a Table included in the Staff Report (Exhibit 197(a), p. 12):

Table 3 - Development Standards (Sec. 4.4.7.B)

Development Standards (R-200)	Required	Proposed
Minimum Lot Area	20,000 sq. ft.	4.48 acres
Minimum Lot Width		
At street line (front lot line)	25 ft.	249.8 ft.
At building line	100 ft.	249.8 ft.
Maximum Lot Coverage	25%	Less than 25%
Minimum Tower Setback		
North property line	80 ft.	264 ft. 10 in.
South property line	80 ft.	28 ft. 11 in. (51 ft. 1 in. waiver requested)
East property line	80 ft.	269 ft. 3 in.
West property line	80 ft.	198 ft.
From closest dwelling	300 ft.	304 ft. 4 in.
Minimum Building Setback		Not applicable, tower setbacks apply
Front	40 ft.	
Side	40 ft.	
Rear	30 ft.	
Maximum Building Height	50 ft.	Not applicable, tower height limits apply
Maximum Density	2.18 units per acre	Not applicable
Minimum Accessory Building Setback		Not applicable, tower setbacks apply
Front	65 ft.	
Side street	40 ft.	
Side setback	12 ft.	
Rear setback	12 ft.	
Parking Requirements (59.6.2.4)	None for the Project	79 spaces are required for the existing use, 80 are proposed. Seven spaces displaced by Project are replaced with 8 new spaces adjacent to the tennis courts.
Minimum parking setback (59.6.2.5.K.2)		
Side	40 ft.	90 ft.
Sum of sides	80 ft.	80 ft.
Rear	12 ft.	50 ft.

Conclusion: The Hearing Examiner finds that with the exception of the minimum tower setback shown above, the Table is accurate. The minimum tower setback requirements for a telecommunications tower as set forth in Section 59.3.5.2.C.2.b.ii.(b) of the Zoning Ordinance are discussed at length in Part II.C.5 of the Decision. In this case, the support structure without the faux branches is 80 feet tall. The Hearing Examiner finds that the height of the proposed support structure camouflaged as a pine tree includes the faux branches, which by definition under the Zoning Ordinance includes attachments. Since there are no existing dwellings located within 300 feet of the proposed location, the Hearing Examiner finds the minimum property line setback for

the conditional use application is 89 feet. Because there is no location on the property where the required tower setbacks can be met for an 89-foot tall tower, the Hearing Examiner cannot reduce the setback even if a setback waiver request had been made. The Hearing Examiner finds that the proposed tower does not comply with the setback requirements set forth in Section 59.3.5.2.C.2.b.ii.(b) and therefore, the application does not meet all the development standards required in the R-200 (Residential Detached) Zone.

C. Use Standards for a Telecommunications Tower (Section 59.3.5.2.C.)

The specific use standards for approval of a Telecommunications Tower Conditional Use are set out in Section 59.3.5.2.C.2. of the Zoning Ordinance. Standards applicable to this application are:

C. Telecommunications Tower

1. Defined

Telecommunications Tower means any structure other than a building, providing wireless voice, data or image transmission within a designated service area. Telecommunications Tower consists of one or more antennas attached to a support structure and related equipment, but does not include amateur radio antenna (see Section 3.5.14.A and Section 3.5.14.B, Amateur Radio Facility), radio or TV tower (see Section 3.5.2.B, Media Broadcast Tower), or an antenna on an existing structure (See Section 3.5.14.C, Antenna on Existing Structure).

Conclusion: The proposed support structure will be constructed to provide wireless communications services within a designated area. Attached to the support structure will be 12 panel antennas. Cables and conduits will connect the related equipment to the support structure. The proposed support structure meets the definition of a telecommunications tower.

2. Use Standards

a. Where a Telecommunications Tower is allowed as a limited use, it must satisfy the following standards:

- i. It must not be staffed.***

Conclusion: The telecommunications tower and associated ground equipment will not be staffed.

The Hearing Examiner finds that this standard is met.

- ii. ***Antennas are limited to the following types and dimensions:***
 - a. ***omni-directional (whip) antennas with a maximum height of 15 feet and a maximum diameter of 3 inches;***
 - b. ***directional or panel antennas with a maximum height of 8 feet and a maximum width of 2 feet; and***
 - c. ***satellite or microwave dish antennas with a maximum diameter of 8 feet.***

Conclusion: Applicants are proposing to install panel antennas with a maximum height of 8 feet and 2 feet wide as shown on the Site Plan (identified as C-3). Exhibit 145(e). Based on the evidence presented and as represented on the Site Plans submitted with the application, the Hearing Examiner finds that this standard is met.

- iii. ***Signs or illumination on the antennas or support structure are prohibited unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.***

Conclusion: No lighting is proposed. A sign no larger than 2 square feet identifying the owner and maintenance service provider will be affixed to the support structure or equipment building in accordance with the requirements of Section 59.3.5.2.C.2.b.x of the Zoning Ordinance. Exhibit 145(a), p. 7. No other signs or illumination will be located on the antennas or support structure unless required by the FCC. Thus, this standard has been met.

- iv. ***In the AR, R, and RC zones, the tower must be located within an overhead transmission line right-of-way and is a maximum height of 199 feet. The tower must be a minimum of 300 feet from any residence. A Telecommunications Tower conditional use application may be filed with the Hearing Examiner to deviate from this standard.***

Conclusion: The subject property is located in the R-200 Zone (Residential Detached). Therefore, this standard is not applicable.

- v. *In the LSC, IL, IM, and IH zones, the tower is a maximum height of 199 feet with a setback of one-foot for every foot of height from all properties zoned Agricultural, Rural Residential, or Residential.*

Conclusion: The subject property is located in the R-200 Zone (Residential Detached). Therefore, this standard is not applicable.

- vi. *In the GR and EOF zones, the tower is a maximum height of 150 feet with a setback of one foot for every foot of height from all properties zoned Agricultural, Rural Residential, or Residential. A Telecommunications Tower conditional use application may be filed with the Hearing Examiner to deviate from this standard.*

Conclusion: The subject property is located in the R-200 Zone (Residential Detached). Therefore, this standard is not applicable.

b. Where a Telecommunications Tower is allowed as a conditional use, it may be permitted by the Hearing Examiner under all applicable limited use standards, Section 7.3.1, Conditional Use, and the following standards:

- i. *Before the Hearing Examiner approves any conditional use for a Telecommunications Tower, the proposed facility must be reviewed by the County Transmission Facility Coordinating Group. The applicant for a conditional use must file a recommendation from the Transmission Facility Coordinating Group with the Hearing Examiner at least 5 days before the date set for the public hearing. The recommendation must be no more than 90 days old.*

Conclusion: The Montgomery County Transmission Facility Coordinating Group reviewed the application and in a Notice of Action dated June 29, 2016, the Tower Committee recommended approval subject to “approval of a Conditional Use for the placement of the monopole.” Exhibit 5(a). The Notice of Action and Tower Coordinator Recommendation were submitted with the original conditional use application filed with OZAH on September 23, 2016. Exhibits 5(a)-(b). The Tower Committee did not review the amended application because the proposed changes were

for additional screening and camouflage to make the monopole look like a pine tree. Exhibit 99(a). The Opposition argued that the June 29, 2016, TFCG recommendation was more than 90 days old. However, based on the legislative history of ZTA 10-05, the intent of this requirement is that the TFCG recommendation be no more than 90 days old at the time the conditional use application is filed. Since the Zoning Ordinance permits conditional use applications to be amended and the Chair of the Tower Committee determined the proposed modifications did not require a second review, the Hearing Examiner finds that the TFCG recommendation dated June 29, 2016, was timely filed and this standard is met.

ii. A Telecommunications Tower must be setback from the property line, as measured from the base of the support structure, as follows:

a. A Telecommunications Tower is prohibited in any scenic setback indicated in a master plan.

Conclusion: Technical Staff advises that the proposed facility is not located in any scenic setback indicated in the master plan. Exhibit 197(a), p. 26. Having no evidence to the contrary, the Hearing Examiner finds that this standard is met.

b. In the Agricultural, Rural Residential, and Residential Detached zones, a distance of one foot for every foot of height or 300 feet from an existing dwelling, whichever provides the greater setback.

Conclusion: As discussed in the previous Section and in Part II.C.5, of this Decision, the Hearing Examiner finds that the property line setback is based on the height of the proposed monopine with the faux branches, which is 89 feet. Based on the evidence of record, there is no place on the property where the support structure can meet all required setbacks for an 89-foot tower. Based on the evidence of record, the Hearing Examiner finds that this standard cannot be met.

c. In the Employment zones, a distance of one-half foot for every foot of height when abutting Commercial/

Residential, Employment, or Industrial zoned properties, and one foot for every foot of height when abutting Agricultural, Rural Residential, or Residential zoned properties.

Conclusion: The subject site is located in the R-200 Zone. Therefore, this standard is not applicable.

- d. The Hearing Examiner may reduce the setback requirement to not less than the building setback for a detached house building type in the applicable zone or to a distance of one foot from an off-site dwelling for every foot of height of the support structure, whichever is greater, if evidence indicated that a reduced setback will allow the support structure to be located on the property in a less visually obtrusive location than locations on-site where all setback requirements can be met after considering the height of the structure, topography, existing vegetation, nearby residential properties, and visibility from the street. A reduced setback may be approved only if there is a location on the property where the setback requirements can be met.***

Conclusion: Applicants request for a setback waiver was for an 80-foot tall tower. As discussed in Part II.C.5. of this Decision, the Hearing Examiner found that the height of the proposed tower is 89 feet tall and not 80 feet. As a result, the minimum property line setback is 89-feet. The Applicants did not request a setback waiver for an 89-foot tower because there is no location the property where the setback requirements can be met. Therefore, the Hearing Examiner finds that this standard cannot be met.

- iii. The maximum height of a support structure and antenna is 155 feet, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communications purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection required by the building permit, the applicant must certify to DPS that the height and location of the support structure conforms***

with the height and location of the support structure on the building permit.

Conclusion: Applicants are proposing to construct an 80-foot tall support structure with antennas centered on the pole at 76'. The support structure will be camouflaged as a pine tree which necessarily include faux branches that will hide the antennas. The 9 feet faux branches will extend the height of the support structure to 89 feet, which is below the maximum height requirement of 155 feet. Therefore, the Hearing Examiner finds that this standard can be met.

- iv. The support structure must be located to minimize its visual impact. Screening under Division 6.5 is not required, however, the Hearing Examiner may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and nearby residential properties.***

Conclusion: As discussed in Part II.D. of this Decision, there is no place on the property where the proposed tower can be located to minimize its visual impact from off-site views. While the equipment compound will be adequately screened, the existing buffers to the west, north and east do not provide sufficient to screening to make the tower less visually obtrusive. Disguising the tower to look like a pine tree, however, does little to minimize the significant bulk and height of the proposed monopine from the surrounding neighborhood given the site's topography and the close proximity to the homes to the west, north and east. The Hearing Examiner finds that for the reasons stated herein, this standard is not met.

- v. The property owner must be an applicant for the conditional use for each support structure.***

Conclusion: The property owner, East Gate Recreation Association, Inc., is co-applicant to the conditional use application. The Hearing Examiner finds that this standard is met.

- vi. ***A modification of a conditional use is only required for a change to any use within the conditional use area directly related to the conditional use approval.***

Conclusion: Applicants acknowledge and agree to comply with this standard requirement. Technical Staff included this as a condition of approval. Exhibit 197(a), p. 29. The Hearing Examiner finds that this standard can be met.

- vii. ***A support structure must be constructed to hold a minimum of 3 wireless communication carriers unless the Hearing Examiner finds:***

- a. ***that collocation at the proposed location is not essential to the public interest; and***
- b. ***that construction of a lower support structure with fewer wireless communication carriers will promote community compatibility.***

Conclusion: The proposed support structure will be constructed to hold a minimum of 3 wireless communication carriers. As proposed, Verizon will install 12 panel antennas with a RAD center at 76', with room for future additional carrier antennas at 66' and 56'. Exhibit 145(a). Thus, the Hearing Examiner finds this standard can be met. However, as discussed in Part II.F. of this Decision, the Hearing Examiner finds that given the existing topography, vegetation and existing trees, the co-location opportunities are limited despite the structure being designed to accommodate 3 wireless carriers.

- viii. ***The equipment compound must have sufficient area to accommodate sheds or cabinets associated with all the carriers. Outdoor storage of equipment or other items is prohibited.***

Conclusion: The tower and related equipment will be located within an enclosed 700-square foot leased area or equipment compound measuring 35' x 20' in the parking lot of the Swim Club. The equipment compound will not accommodate future carriers. Applicants propose to expand the

equipment compound to the west. The proposed expansion area will be approximately 580 square feet, measuring 29' x 20'. With the expansion area, the equipment compound will be 1,280 square feet, measuring 64' x 20'. Based on the evidence presented and having no evidence to the contrary, the Hearing Examiner finds that this standard will be satisfied with the expansion area as proposed.

- ix. The support structure must be removed at the cost of the owner of the Telecommunications Tower when the Telecommunications Tower is no longer in use by any wireless communication carrier for more than 12 months.*

Conclusion: Applicants acknowledge and agree to comply with this standard requirement.

Technical Staff included this as a condition of approval. Exhibit 197(a), p. 30. The Hearing Examiner finds that this standard will be met.

- x. The support structure must be identified by a sign 2 square feet or smaller, affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Hearing Examiner notified within 10 days of any change in ownership.*

Conclusion: A sign no larger than 2 square feet identifying the owner and maintenance service provider will be affixed to the support structure or equipment building in accordance with the requirements of this Section. The Hearing Examiner finds that this standard can be met.

- xi. Each owner of the Telecommunications Tower is responsible for maintain the wireless communications tower in a safe condition.*

Conclusion: Applicants acknowledge and agree to comply with this standard requirement.

Technical Staff included this as a condition of approval. Exhibit 197(a), p. 30. The Hearing Examiner finds that this standard will be met.

- xii. The Hearing Examiner must make a separate, independent finding as to need and location of the facility. The applicant*

must submit evidence sufficient to demonstrate the need for the proposed facility.

Conclusion: As discussed in Part II.F of the Decision, the Hearing Examiner is persuaded that Verizon has demonstrated a need for the proposed facility to provide enhanced cell coverage to its customers. However, for the reasons stated in Part II.F and above, the Hearing Examiner finds that the location proposed for facility is not the appropriate location because it cannot comply with the required setbacks anywhere on the property. The minimum height of the tower to achieve Verizon's RF objectives at this location is 80 feet. The proposed tower is 89-feet tall. The site is too narrow to comply with the setback requirements. A shorter structure that may meet the setbacks is not feasible because the topography and existing trees at 60 to 70 feet will interfere with the antennas and reduce the range of coverage for the intended service area. As a result, the site constraints realistically limit or possibly eliminate co-location opportunities, thereby turning the proposed structure into a single cell tower. Based on the evidence of record and for the reasons previously stated, the Hearing Examiner finds that the East Gate Swim Club property is not the appropriate location for the proposed tower.

D. Applicable General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The requirements of these sections need be satisfied only "to the extent the Hearing Examiner finds necessary to ensure compatibility." *Zoning Ordinance*, §59.7.3.1.E.1.b. The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Parking Requirements

Parking, queuing and loading standards are governed by Division 6.2 of the Zoning Ordinance. Technical Staff advises that pursuant to Section 59.6.2.4 of the Zoning Ordinance "there are no minimum parking requirements for a telecommunications facility." Exhibit 197(a),

p. 15. However, Technical Staff notes that while the proposed use will be located in the existing 79-space surface parking required under the special exception (S-596), the proposed expansion parking area will replace the parking space used for the proposed use. Staff advises (*Id.*):

While the facility is located within the existing parking lot, there is no impact expected to vehicular circulation because the facility is not located within any driving isle or maneuvering space. Further, the seven parking spaces displaced by the Project are replaced, and one additional parking space is added to accommodate a maintenance vehicle. The existing ADA accessible parking spaces are not impacted. There is no net loss in the required amount of parking for the recreation club.

Conclusion: The proposed use will be unmanned with few visits to the site for regular and emergency maintenance, which Applicants report will be approximately four times a year. There is sufficient on-site parking to accommodate maintenance vehicles. The Hearing Examiner agrees with Staff and finds that no new parking spaces are required for the proposed use, and this standard is met.

2. Site Landscaping and Screening

Technical Staff reports (Exhibit 197(a), p. 15):

Pursuant to [Section 59.6.4.3 of the Zoning Ordinance (General Landscaping Requirements) and Section 6.5.3 of the Zoning Ordinance (Screening Requirements)], the existing perimeter landscape provides adequate screening of the Project from off-site views. The buffer landscaping provides screening from both Gainsborough Road and Democracy Boulevard. The interior placement of the Project within the existing parking lot and away from residential properties to the west and north, buffers the facility from adjacent residential uses. Additionally, new landscaping is proposed along the north property line to further screen and buffer the project from residential areas. By maintaining the existing landscaping, planting additional landscape, and situating the Project as proposed, the Project satisfies landscaping requirements.

Conclusion: For the reasons discussed at length in Part II.D. of this Decision, the Hearing Examiner finds that the existing and proposed landscaping will not be sufficient to reduce visibility of the proposed tower from the surrounding neighborhood. The Hearing Examiner therefore

concludes that the landscaping and screening will not be adequate to ensure compatibility of the proposed use with the surrounding residential neighborhood, and finds this standard has not been met.

3. Outdoor Lighting and Signage

Division 59-6.4. of the Zoning Ordinance contains general outdoor light requirements for new outdoor lighting for conditional uses. Staff advises that there are no outdoor lighting requirements for the proposed facility and no lighting is proposed. Exhibit 197(a), p. 16.

Conclusion: Because no new lighting is required or proposed, the Hearing Examiner agrees with Technical Staff and finds that this standard is met.

Division 59-6.7 governs the requirements for signs in a residential area. Section 59.6.7.8 of the Zoning Ordinance provides: “The maximum total of all permanent signs on a lot or parcel in a Residential Zone is 2 square feet...” Technical Staff reports a sign no larger than 2 square feet identifying the owner and maintenance service provider will be affixed to the support structure or equipment building, in accordance with the requirements of Section 59-3.5.2.C.2.b.x of the Zoning Ordinance (2014). Exhibit 197(a), pp.16, 30.

Conclusion: Given the size of the sign required for the proposed use will be no larger than 2 square feet, the Hearing Examiner agrees with Staff and finds that this standard is met.

IV. CONCLUSION AND DECISION

As set forth above, the application does not meet all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance. The proposed conditional use does not comply with the general conditions and the standards for approval of a conditional use for a telecommunications tower.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the Application of Cellco Partnership d/b/a Verizon Wireless and East Gate Recreation Association, Inc., for a conditional use under Section 59.3.5.2. of the Zoning Ordinance, to install and operate a telecommunications tower and related equipment at 10200 Gainsborough Road, Potomac, Maryland is hereby ***DENIED***.

Issued this 7th day of March, 2018.



Tammy J. CitaraManis
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding

the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

Cellco Partnerships, CU Applicant
East Gate Recreation Association, Inc., CU Applicant and Property Owner
Cathy Borten, Esquire, Attorney for Applicant Cellco
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Franceschini, and Jamie Perry
All parties of record and all who testified at the hearing
Barbara Jay, Executive Director, Montgomery County Board of Appeals
Gregory Russ, Planning Department
Phillip Estes, Planning Department
Ehsan Motazed, Department of Permitting Services
Alexandre A. Espinosa, Director, Finance Department